Supreme Court, U.S.
FILED
07-269 AUG 27 2007
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ADVANCED CELLULAR SYSTEMS
and ADVANCED CELLULAR PAGING,

Petitioners,

v.

PUERTO RICO TELEPHONE COMPANY
and CELULARES TELEFONICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an action that is based on contract rights asserted under Puerto Rico law, the First Circuit's decision to rely on general law derived from jurisdictions other than Puerto Rico and from the *Restatements* instead of applying Puerto Rico contract law granted a windfall to Respondents merely because the instant case is under the Federal Court's Bankruptcy jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioners, who were debtors and appellees below, are Advanced Cellular Systems, Inc. and Advanced Cellular Paging Systems.

Respondents, who were creditors and appellants below, are Puerto Rico Telephone Company and Celulares Telefonica.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Advanced Cellular Systems and Advanced Cellular Paging Systems do not have any parent corporations and no publicly held company owns 10% or more of the corporations' stock.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 483 F.3d 7 (1st Cir. 2007), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1-11. The District Court's opinion is unreported and is reprinted at Pet. App. 12-23. The Bankruptcy Court's opinion is unreported and is reprinted at Pet. App. 24-49.

JURISDICTION

The Court of Appeals entered its judgment on March 28, 2007 and denied Rehearing on May 30, 2007. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC § 1652 and 31 L.P.R.A. § 3471 *et seq.*

STATEMENT

A. Factual Background

In September 1986 Advanced Cellular Systems and Advanced Cellular Paging Systems[1] (hereinafter Advanced

[1] Advanced Cellular Systems and Advanced Cellular Paging Systems share common ownership, a common board of directors, and corporate officers. The two corporate entities have been treated as a single entity throughout this litigation and therefore will be referred to, collectively, as Advanced Cellular. Similarly, Puerto Rico Telephone

(Continued on following page)

Cellular) entered into a contract with Puerto Rico Telephone Company and its affiliate Celulares Telefonica (hereinafter PRTC) enabling Advanced Cellular to "re-sell" cellular service provided by PRTC's network to individual customers. The contract, entitled "Wholesale Service Agreement," was concluded under Puerto Rico law. Advanced Cellular and PRTC maintained their relationship under the Wholesale Service Agreement (hereinafter Wholesale Agreement) and subsequent tariffs issued by PRTC until April 1, 1998 when PRTC terminated its relationship with Advanced Cellular due to what PRTC maintains was an unpaid debt. Shortly thereafter, on May 29, 1998 Advanced Cellular filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

During the years between when the Wholesale Agreement was entered in 1986, and the conclusion of the business relationship between PRTC and Advanced Cellular in 1998, the telecommunications industry witnessed the growth of a phenomenon called cloning. "Cloning" in this context occurs when people who do not have permission to enter a cellular network re-program a non-authorized handset in a manner to impersonate, or "clone," the signal of an authorized phone.[2] By using a re-programmed handset, or cloned handset, an unauthorized user is then able to enter a cellular network without paying for access to the network.

Company and Celulares Telefonica have been considered a single entity throughout this litigation.

[2] A cloned phone copies both the electronic serial number (HEX number) of an authorized phone and its cellular number.

In 1986 when Advanced Cellular and PRTC entered the Wholesale Agreement, cloning was not a problem and was completely unforeseen as a potential danger. (Pet. App. at 18). Beginning in the early 1990s and reaching its peak in 1996, cloning became a problem costing the telecommunications industry tens of millions of dollars per year. Due to the billing practices common in the telecommunications industry, networks that were duped by cloning charged authorized users with the expenses incurred by the people who used cloned handsets and later refunded this amount when the authorized user notified the network of the cloning-related charge.

In the instant case, Advanced Cellular documented over $7.1 million in charges sent to it by PRTC that were the result of third-party cloning during the period from 1992-1996. PRTC acknowledged that the charges were the result of cloning but only granted credits to Advanced Cellular totaling approximately $5.8 million. (Pet. App. at 36). The difference between the amount credited to Advanced Cellular by PRTC to compensate it for cloning costs and the amount charged to Advanced Cellular as the result of third-party cloning is $1.33 million. This sum represents the monetary element to the dispute between Advanced Cellular and PRTC.

Prior to the commencement of the instant litigation, PRTC issued a series of tariffs to Advanced Cellular governing the price of access to its cellular network. These tariffs issued subsequent to the conclusion of the Wholesale Agreement also carried provisions noting terms and conditions of services between PRTC and its resellers. These tariff agreements were not the product of negotiation between the parties but were written solely by PRTC

and delivered to its resellers, of which Advanced Cellular was one.

The 1986 Wholesale Agreement references the unitary nature of the tariffs that PRTC would issue subsequent to the Agreement. The Wholesale Agreement stated that: "[v]ariances from this agreement in any Reseller order will be of no effect, except that the prices specified . . . may be changed at the sole discretion of PRTC within the guidelines of the appropriate tariff." Wholesale Agreement Provision XXIII (Pet. App. at 65). Despite the unitary nature of the tariffs, the parties agreed in the Wholesale Agreement that PRTC would bear the cost of "failing to maintain proper standards of maintenance and operation" of its network. Wholesale Service Agreement, Provision V, paragraph F (Pet. App. at 56).

In its 1994 tariff, PRTC included provisions that differ from the original Wholesale Agreement. Specifically, PRTC included a provision that affirmed its property rights in the access numbers it issued to Advanced Cellular, February 1994 Tariff, Section III (c), and it included the following provision:

> The reseller shall be solely responsible for all risk and expenses incurred in connection with its actions in the sale and service of the Cellular Service or any other acts of the reseller pursuant to this tariff. The reseller shall act in all respect on its own account and shall be solely responsible for any credit verification, deposits, billing, consolidation, rebilling, reseller or authorized user billing complaints, toll calls, bad debts and fraudulent use, by any person of any number or numbers assigned to the reseller.

February 1994 Tariff, Section IV, subsection (B)(5)(c) (Pet. App. at 70).

The parties stipulate that no agreement between them explicitly references cloning. The substance of the dispute between the parties is how Puerto Rico law evaluates the original Wholesale Agreement, the pattern of performance between the two parties, and the 1994 tariff issued by PRTC in determining which party was responsible for bearing the cost of cloning.

B. Proceedings Below

In September 1998, PRTC filed a Proof of Claim totaling $1,655,391 in the United States Bankruptcy Court for the District of Puerto Rico against Advanced Cellular. Of this amount, $1,334,204 represented charges that were the result of third-party cloning. Advanced Cellular argued, however, that of the $1.6 million asserted in the Proof of Claim, the $1.33 million that related to cloning charges should be disallowed as that expense was the responsibility of PRTC.[3]

The Bankruptcy Court convened an evidentiary hearing and held that cloning was an attack on PRTC's network. The court also held that PRTC had a duty under the contract to ensure that its network met industry standards of security and should bear the costs when it

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[3] Advanced Cellular also maintained that due to PRTC's billing irregularities, its improper rounding of air time, and failures to account properly for payments it made, that PRTC owed Advanced Cellular in excess of $700,000 separate from any issue pertaining to cloning fraud. The Bankruptcy Court ruled in favor of Advanced Cellular's claims regarding these issues. The Bankruptcy Court's findings with respect to these issues was not a subject before the First Circuit.

failed in this obligation.[4] (Pet. App. at 38). Further, the Bankruptcy Court held that in light of PRTC's practice of crediting over $5 million to Advanced Cellular to compensate it for cloning costs, it "defied common sense" for PRTC to argue that it was not, and did not perceive itself, responsible for cloning costs. *In Re Advanced Cellular*, 483 F.3d 7, 10 (1st Cir. 2007). The Bankruptcy Court further held that the practice of the parties revealed that both parties considered cloning to be an attack on the network and that PRTC was therefore responsible for the costs. Therefore, the Bankruptcy Court disallowed the portion of PRTC's proof of claim representing the costs of the cloning charges. PRTC appealed to the District Court and it affirmed. PRTC then appealed to the First Circuit.

The First Circuit reversed the District Court and Bankruptcy Court because it held that the 1994 Tariff Provision put the burden of the costs associated with cloning on Advanced Cellular regardless of whether the fraud was targeted against the network or perpetrated by its individual customers. The Court held that cloning was fraud, that Advanced Cellular was responsible for fraud under its reading of the 1994 tariff, that no other provision of the contract between the parties was relevant

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[4] PRTC argued before the Bankruptcy Court that it disallowed Advanced Cellular's claims for cloning because Advanced Cellular took longer than 90 days to notify PRTC about the cloning. The Bankruptcy Court rejected PRTC's argument and held, in the context of the relationship between the two parties, that 90 days was an unreasonably short period for Advance Cellular to notify PRTC about cloning claims. As will be discussed, the First Circuit disposed of the case without affirming whether the Bankruptcy Court's holding that PRTC's time demands were unreasonable and therefore this argument is not a subject of this Petition.

in allocating responsibility for preventing fraud against the network, that the conduct of the parties during the course of their 12 year business history was irrelevant, that the fact that cloning was not foreseen at the time the parties entered their agreement did not hold importance, and that Advanced Cellular was therefore responsible for the $1.33 million in costs due to cloning. The First Circuit issued its opinion on March 28, 2007 and denied Petitioners' Motion for Rehearing on May 30, 2007.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S DECISION REPLACES PUERTO RICO LAW WITH GENERAL LAW DERIVED FROM A HAPHAZARD ASSORTMENT OF COMMON LAW JURISDICTIONS AND GENERAL COMMON LAW PRINCIPLES IN VIOLATION OF FEDERALIST PRINCIPLES AND THE *ERIE* DOCTRINE.

On multiple dispositive points in its decision, the First Circuit relied on law that is materially different from Puerto Rico law. It removed a clause from the context of a larger agreement pursuant to Massachusetts partnership law. *In Re Advanced Cellular*, 483 F.3d 7, 11 (1st Cir. 2007) (Pet. App. at 9). It assigned a broad meaning to the terms in the severed clause pursuant to Delaware contract law. (Pet. App. at 7). It based its interpretation of words in the severed clause on the interpretive tools necessary for the statutory construction of a federal statute. (Pet. App. at 6). It excluded potentially conflicting contractual provisions between the parties based on the *Restatements*. (Pet. App. at 8). Each one of these discrete decisions was key to the court's holding. Yet, none of these decisions relied on

Puerto Rico law as is required by *Erie* and by numerous supporting decisions from this Court. Indeed, the First Circuit preferred to rely on a general principle derived from the *Restatements* rather than consult Puerto Rico law. At other points in its opinion, such as declaring that cloning was "fraud" and of the type of fraud covered in the agreement, it offered no other support for its declaration than the declaration itself. *Advanced,* 483 F.3d at 11.

If any single one of these discrete elements of the opinion were decided differently or if the law used to support the court's decision were different, the basis for the holding could not have been the same. That in so many fundamental components of its opinion the First Circuit did not consult or cite or even provide some cursory connection to Puerto Rico law demonstrates that the First Circuit's decision and mode of analysis is materially different from that of a Puerto Rico court.

A. Long Standing Precedent Mandates that the First Circuit Apply Substantive State Law to Determine the Outcome of State-based Claims Against Debtors

Although the instant action began in federal bankruptcy court, federal courts are bound to apply state law in assessing claims. This Court in *Raleigh v. Illinois Dept. of Revenue,* 530 U.S. 15 (2000), held that:

> Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. The 'basic federal rule' in bankruptcy is that state law governs the substance of

> the claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.

Raleigh v. Illinois Dept. of Revenue, 440 U.S. 15, 54 (2000) (quotations omitted).

This Court, in *Butner v. United States,* 440 U.S. 48 (1979), established the rule and rationale governing the application of state law to claims raised in bankruptcy court.

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. *Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.*

Butner v. United States, 440 U.S. 48, 54 (1979) (emphasis added).

The legal heritage of the rule in *Butner* traces back to this Court's decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Although the instant case is not a "diversity case," as was true in *Erie,* "the *Erie* doctrine applies to any case in which state law supplies the rule of decision." *Zapata Hermanos Sucesores v. Hearthside Baking Company,* 313 F.3d 385, 390 (7th Cir. 2002) (*citing O'Melveny & Myers v. FDIC,* 512 U.S. 79, 83-85, 87-88 (1994)). In holding that the *Erie* doctrine applies to claims arising from state law, the *Zapata* court confirms the plain language of the governing statute which requires that "the

laws of the several states . . . be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 USC § 1652. As in the instant case, the court in *Zapata* had to apply civil law principles to the substantive matters in the dispute. The court likened its obligation to apply civil law principles to its obligation to apply state law and held that:

> [U]nder the *Erie* doctrine a federal court is not authorized to apply a different substantive law of contracts in a diversity case from the law that a state court would apply were the case being litigated in a state court instead.

Zapato, 313 F.3d at 390.

B. The First Circuit's Opinion Effectively Divests Puerto Rico of Its Authority to Establish Contract Law Principles Governing the Relationships Between Parties

Erie's mandate is clear: "there is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Despite this mandate, the First Circuit relied on general common law principles to dispose of the instant case.

Puerto Rico being a civil law jurisdiction relies first on its Civil Code to help it interpret contracts. Petitioners understand that the interpretation of a properly stated rule of Puerto Rico contract law is not a prime concern before this Court. Rather, the concern before this Court is whether the First Circuit applied Puerto Rico law. Therefore, Petitioners here briefly summarize Puerto Rico contract law to demonstrate the chasm between what Puerto Rico law is and what the First Circuit applied.

The key statutes governing contract construction under Puerto Rico law are 31 L.P.R.A. § 3471 *et seq.* The first statute in this series, 31 L.P.R.A. § 3471, commands that when the terms of a contract "are clear and leave no doubt as to intentions" the literal meaning of the terms shall be observed unless "the words should appear contrary to the evident intention of the contracting parties." This provision requires a two-step process defining whether terms are clear and then whether the terms contradict the intentions of the parties. To determine the intentions of the parties, 31 L.P.R.A. § 3472 requires courts must be attentive to the parties' "acts, contemporaneous and *subsequent to the contract*" (emphasis added). If a contract uses general terms, 31 L.P.R.A. § 3473 requires that "there should not be understood as included [in the contract] things and cases different from those with regard to which the persons . . . intended to contract."

The First Circuit has in the past recognized the uniqueness of Puerto Rico's status as a civil law jurisdiction. In *Borschow Hosp. & Med. Supplies Inc. v. Cesar Castillo Inc.*, 96 F.3d 10 (1st Cir. 1996), the court held that "as a civil law jurisdiction, Puerto Rico eschews common law principles of contract interpretation in favor of its own civil code derived from Spanish law." Emphasizing this point, prior to the instant case, the First Circuit correctly noted that "the Supreme Court of Puerto Rico has made clear that the common law of the United States is not controlling, when filling gaps in the civil law system." *Guevara v. Dorsey Labs, Div. of Sandoz, Inc.*, 845 F.2d 364, 366 (1st Cir. 1988). Yet, in the instant case the First Circuit did use common law to fill gaps.

The First Circuit placed its primary emphasis on examining one portion of a clause in the February 1994

tariff between the parties. The portion of the clause reads "reseller shall be solely responsible for any . . . fraudulent use, by any person, of any numbers assigned to reseller." The First Circuit's only cited authority for taking this clause out of context and making it determinative of the proceedings is a common law case – *Bank v. IBM Corp.*, 145 F.3d 420 (1st Cir. 1998). In the instant case the First Circuit held that "the provision that speaks directly to the issue governs" and cited *Bank* for its authority. *Advanced*, 483 F.3d at 11 (Pet. App. at 9).

Although a First Circuit case, *Bank*, does not concern Puerto Rico law. Rather, it is an analysis of Massachusetts partnership law. The case involves complicated issues of partnership law under Massachusetts law. *Bank*, 145 F.3d at 422. The case does not, however, include an analysis of Puerto Rico contract law – the law that is controlling in the instant case. Moreover, *Bank* does not offer any justification for taking one clause out of an agreement and making it determinative of an issue under Puerto Rico law. Indeed, Puerto Rico law mandates that "the various terms of a contract should be read together and harmonized so as to determine the true intent of the parties." *Ulpiano Casal Inc., v. Totty Mfg. Corp.*, 90 P.R.R. 739 (1964). *See also Carillo Norat v. Camejo*, 107 D.P.R. 132 (1978).

In the Wholesale Agreement and the various tariffs there is only one provision that has "Fraud" in its title – the "Abuse and Fraudulent Use of CRS"[5] provision of the Wholesale Agreement. Wholesale Service Agreement Provision XIII (B). According to this section, Advanced

[5] CRS refers here to "Cellular Radio Service."

Cellular was responsible for and obliged to prevent its users from making

> [F]oul or profane expressions, [from] impersonat[ing] another person with fraudulent or malicious intent, to call another person so frequently or at such times of day in any other manner so as to annoy, abuse, threaten, or harass.

Wholesale Service Agreement Provision XIII(B) (Pet. App. at 60). The parties here defined "fraud" in their agreement in a manner that confined the term to certain acts perpetrated by the authorized users themselves. The First Circuit, under its "*Bank*" doctrine did not explain why this contract clause was not relevant in defining the scope of fraud in the case or why Puerto Rico law requiring the harmonization of various contract provisions should not have been considered. Instead, once the First Circuit court removed the clause from the context of the contract, it sought the broadest possible meaning of the terms regardless of how it affected other provisions of the contractual relationship.

The First Circuit held that Advanced Cellular "broadly assume[d]" responsibility for fraud due to the wording of the 1994 tariff clause. *Advanced,* 483 F.3d at 11 (Pet. App. at 7). The First Circuit held that where parties use broad terms they are responsible for the consequences. The First Circuit cited not Puerto Rico law for this proposition but rather *MBIA Insurance Corp. v. Royal Indem. Co.*, 426 F.3d 204 (3d Cir. 2005).

Unlike *Bank*, *MBIA* is a case analyzing contract law – but it analyzes Delaware contract law. Rather than rely on a properly stated rule of Puerto Rican law, the First Circuit relied on the Third Circuit's interpretation of

Delaware contract law. In *MBIA*, the court analyzed Delaware's "objective theory of contract." *MBIA*, 426 F.3d at 210. The court noted that Delaware's law differs from general principles of contract law in many other jurisdictions. "Although the law of contract generally strives to enforce agreements in accord with their makers' intent, the objective theory considers 'objective acts' the best evidence of that intent." *MBIA*, 426 F.3d at 210 (quotations omitted).

Petitioners cannot determine whether this is a proper statement of Delaware law, but petitioners can argue with confidence that Delaware law is not Puerto Rico law. Indeed, according to the court in *MBIA*, Delaware law differs from other common law jurisdictions because it uses different evidentiary standards to discern the intent of the parties. Therefore, any general principle that can be distilled from *MBIA* is best left to the construction and application of contracts exclusively under Delaware law. Binding parties who made a contract under Puerto Rico law to the terms and rules of construction of Delaware law is, without any other explanation, contrary to both the *Erie* doctrine and to rational decision-making.

The First Circuit did not cite any Puerto Rico law providing guidance to courts in construing broadly written terms. Yet, Puerto Rico has a statutory provision on point. 31 L.P.R.A. § 3473 reads: "However general the terms of a contract may be, there should not be understood as included therein things and cases different from those with regard to which the persons interested intended to contract." To take full effect, this provision requires courts to analyze the intent of the parties involved in a contract – as demonstrated by their acts contemporaneous with the contract and subsequent to the contract. *See* 31 L.P.R.A.

§ 3472. The First Circuit refused to analyze the intent of the parties under its interpretive scheme.

The First Circuit relied on a case interpreting Massachusetts partnership law to justify its decision to analyze a clause from the 1994 tariff independent of its context. The First Circuit then relied on a case concerning Delaware contract law to ascribe a broad meaning to the words used in the clause. The First Circuit then sought support for defining the term "any person" within the context of this severed clause. The First Circuit relied on a Fifth Circuit case, *DIRECTV v. Budden*, 420 F.3d 521 (5th Cir. 2005), to help it interpret the phrase. *Advanced*, 483 F.3d at 11 (Pet. App. at 6).

DIRECTV, however, was not a case that concerned the civil law nor was it a case that concerned contract law. Rather, the court in *DIRECTV* sought to define the term "any person aggrieved" in the context of a federal criminal statute. *DIRECTV*, 483 F.3d at 527. The *DIRECTV* court noted that the statute at issue exhaustively listed a series of people who could properly be categorized as "any person aggrieved" in order to be covered by the federal statute. *Id.* The *DIRECTV* court, analyzing the examples enumerated in the statute along with the statute's use of the word "include," held that the term "any aggrieved person" covers a broad category of people. *Id.* at 528. *DIRECTV* did not involve general rules of contract interpretation and most especially did not deal in any way with how civil systems generally interpret contract law. The First Circuit did not note why it found this particular case from a different jurisdiction about a different issue dispositive of a matter of contract construction in a civil law jurisdiction.

Later in its opinion, the First Circuit bolstered its broad reading of the clause by citing *Metlife Capital Corp.*

v. Westchester Fire Ins. Co., 224 F.Supp.2d 374 (D.P.R. 2002). The First Circuit summarized the holding in *Metlife* by writing "under Puerto Rico law, contractual terms should generally be assigned their common meanings." *Advanced*, 483 F.3d at 11 (Pet. App. at 8). The *Metlife* court, however, summarized the rule in Puerto Rico in a far more nuanced fashion:

> When engaging in contract interpretation, *contract clauses and provisions should be read in relation to one another*, giving to those that are unclear the meaning which arises from considering all the clauses together. Terms should be assigned their common meanings, and *any term having multiple meanings should be read in the sense that is most suitable to give it effect.*

Metlife Capital Corp. v. Westchester Fire Insurance Co., 224 F.Supp.2d 374, 382 (D.P.R. 2002) (quotations omitted; emphasis added). The *Metlife*'s court summary of Puerto Rico law supports Advanced Cellular's position raised before the First Circuit rather than militates against it.

Congruent with the demands of the Puerto Rico Civil Code, the *Metlife* summary of Puerto Rico law places an emphasis on harmonization of all contract terms and on the intent of the parties. The First Circuit, however, avoids these statutory commands and avoids the implications of *Metlife*'s summary of the edicts of Puerto Rico law by narrowly rewording *Metlife*'s summary.

In addition to relying on a blunt summary of *Metlife*'s understanding of Puerto Rico law, the First Circuit relies on a Puerto Rico statute that it quotes incompletely. The First Circuit cited 31 L.P.R.A. § 3471 as reading "If the terms of a contract are clear and leave no doubt as to the

intentions of the parties, the literal sense of the stipulations shall be observed." *Advanced,* 483 F.3d at 12 (Pet. App. at 9). There is a second clause to 31 L.P.R.A. § 3471, however, that reads "[i]f the words [of the contract] should appear contrary to the evident intention of the contracting parties, the intention shall prevail." The First Circuit neither cites nor references the second clause of 31 L.P.R.A. § 3471. Petitioners concede that interpreting the interplay between the two clauses of § 3471 can be difficult. Nevertheless, the First Circuit's obligation to apply Puerto Rico law required it to cite relevant provisions correctly, apply them and to consider other relevant provisions, including provisions such as statutory mandates to harmonize all provisions of a contract, statutory commands to evaluate intent by considering the acts of the parties contemporaneous with and subsequent to the contract, and provisions to interpret ambiguous clauses against the drafter. The First Circuit's omission of the full citation of § 3471, its failure to apply it, and its failure to consider and apply other provisions amid its preference for the law of other jurisdictions over Puerto Rico law raise grave questions about its willingness to apply Puerto Rico law as required by this Court.

Although the First Circuit was willing to impose definitions on terms used in the severed 1994 tariff clause based on rules supplied from other jurisdictions, curiously, the Court did not seek definitions of the terms used in the clause when the same terms were defined in the Wholesale Agreement. The 1994 clause places responsibility on Advanced Cellular for numbers "assigned to" it. These "assigned numbers" are indeed the "access numbers" given to Advanced Cellular by PRTC. The term "access numbers" is defined in the Wholesale Agreement. In Section I of the

1986 Wholesale Service Agreement between the parties, "access number" is defined as "a telephone number provided to Reseller by PRTC and associated with Reseller's or its authorized user's mobile radio unit, enabling use of the cellular system." (Pet. App. at 51). This definition combined with the provision limiting Advanced Cellular's liability for fraud to acts by its "authorized users" go against the First Circuit's broad reading of the severed 1994 tariff term. Further, Puerto Rico law would seem to require a harmonization of all contract terms in accordance with the intent of the parties as evinced by their conduct contemporaneous with and subsequent to the contract. The First Circuit, however, avoided the need to state Puerto Rico law properly by relying on the *Restatement of Contracts* instead. *Advanced,* 483 F.3d at 12 (Pet. App. at 8).

The First Circuit held that "it is well established that courts should avoid interpretations that render a provision of an agreement surplusage. *See Restatement (First) of Contracts* § 236 (1932)." *Advanced,* 483 F.3d at 12 (Pet. App. at 8). This well-established rule, however, is a common law rule. Indeed, the *Restatements* primarily serve as a source of general legal principles for common law jurisdictions. Again, the First Circuit decided an important issue in the instant case based on a source of law that is irrelevant to the state law that should govern the case. The First Circuit cites no Puerto Rico authority that justifies its decision to read one clause broadly, the clause taken from the 1994 tariff, and others narrowly, the clauses from the 1986 Wholesale agreement. Indeed, after citing the Restatements, the First Circuit reads the clauses from the 1986 Wholesale Agreement so narrowly that they are effectively excluded from consideration.

Compounding the First Circuit's errors in relying on general common law was the First Circuit's proclivity to omit key civil law inquiries. As noted above, the tariffs issued by PRTC subsequent to the Wholesale Agreement were drafted by PRTC and delivered to its resellers without edit. Therefore, were the tariffs valid statements of the parties' intent? The Court did not answer this question and instead declared, without citing a source, that both parties considered the clause binding.[6] *Advanced*, 483 F.3d at 11 (Pet. App. at 6). Moreover, the Court did not analyze the 1994 tariff clause in a manner that acknowledged that it was drafted by one side. 31 L.P.R.A. § 3478 requires courts to interpret "obscure stipulations of a contract" in a manner that does not favor the party "occasioning the obscurity." Puerto Rico courts have read this provision of the civil code to interpret clauses against the drafter "even if the clause [itself] is clear." *See Arthur Young & Co. v. Virgilio Vega*, 135 D.P.R. 157 (1994). *See also La Sagrada Familia v. Castillo*, 107 D.P.R. 405 (1978) (holding that "courts should construe terms of a [contract] . . . against party able to include larger amount of onerous clauses in contract.") Even if the clause from the 1994 tariff agreement is "clear," Puerto Rico law required the First Circuit to have interpreted the clause in a manner that reflected that PRTC drafted it and acknowledge that PRTC was in a position to inflict "onerous" conditions on Advanced Cellular. In this

[6] Whether the clause severed from the 1994 tariff is binding and how it should be interpreted are matters of law. Advanced Cellular, however, rejects any notion that the tariff clauses were the product of negotiations between it and PRTC. The tariffs use generic language, do not specify particular parties beyond common labels such as "reseller," and were delivered by PRTC to its multiple resellers.

instance the First Circuit did not misapply Puerto Rico law, it chose to ignore Puerto Rico law.

On a more practical level, the First Circuit did not examine how its construction of the 1994 tariff clause affected other civil code provisions governing the relationship between parties. The First Circuit's holding places all the burden of fraud directed against PRTC's network from cloning on Advanced Cellular. Yet, PRTC is the party responsible for maintaining its own network in accordance with industry standards. During the evidentiary hearing in Bankruptcy Court, PRTC's own expert stated that PRTC is the party responsible for controlling access to its network. (Pet. App. at 19). The First Circuit's holding therefore places the costs of attacks on the network on one party, Advanced Cellular, while the capability and responsibility for protecting the network is on another party, PRTC.

This situation may implicate Puerto Rico civil law principles. Puerto Rico Civil Code 31 L.P.R.A. § 3047 states a condition of performance "shall be considered as fulfilled when the obligated party should voluntarily prevent fulfillment." In interpreting this provision of Puerto Rico law in an earlier case, the First Circuit held that "under the civil law a condition is deemed 'performed' when nonperformance is utterly within the control of one of the parties." *Martin v. The Vector Company, Inc.*, 498 F.2d 16, 22 (1st Cir. 1974). During the evidentiary hearing, the Bankruptcy Court found that PRTC was not meeting its duty to keep its network up to the standards of the industry. The ability to prevent or protect against cloning was solely within the ability of PRTC and NOT Advanced Cellular. Indeed the First Circuit's interpretation of the

1994 tariff "so minimizes the duty of performance of one of the parties [here PRTC's duty to maintain its network] as to be illusory" and therefore makes the clause void under Puerto Rico law. *Martin*, 498 F.2d at 24.

Prior to the instant litigation, the parties had placed responsibility for bearing the cost of fraud perpetrated by authorized users on Advanced Cellular as Advanced Cellular controlled decisions regarding to whom it would sell its services while PRTC accepted responsibility for maintaining its network. Given the facts of the case, it is plausible that the most harmonious reading of the contractual relationship under Puerto Rico law was that the parties allocated the responsibility for fraud to the party best positioned to prevent fraud. Regardless of whether this is so, this Petition maintains that it was the First Circuit's responsibility to properly state Puerto Rico and apply it. The First Circuit omitted several crucial legal inquiries without justification.

C. The First Circuit's Failure To Apply Puerto Rico Law Unfairly Discriminates Against Puerto Rico Litigants And Will Only Encourage Forum Shopping

The reluctance to apply Puerto Rico law in the instant case compounded by the First Circuit's preference for general common law principles directly implicates the *Erie* doctrine this Court refined in *Hanna v. Plumer*, 380 U.S. 460 (1965). In instructing federal courts on when and how to apply State law, *Hanna* commanded that courts ask:

> [W]hether application of the [State's] rule would make so important a difference to the *character or result* of the litigation that failure to enforce it

> [the State's law] would *unfairly discriminate* against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose federal court.

Hanna v. Plumer, 380 U.S. 460, 468 (1965) (emphasis added). If a federal court answered these questions posed in *Hanna* in the affirmative, the court was obliged to apply the state law. *Id. See also Gasperini v. Center for the Humanities*, 518 U.S. 415, 428 (1996) (*affirming Hanna* and holding that a New York law limiting damage awards be applied by a federal court because it was different from the federal standard).

In the instant case, the First Circuit's fondness for common law and its reliance on common law cases and principles certainly altered the character of this litigation from what a Puerto Rico court would have done. The First Circuit's opinion more than altered the character of the litigation, however. Not only did the First Circuit omit several questions that Puerto Rico law requires to be considered, it relied on Massachusetts Partnership law to justify its severance of a clause from a larger contractual scheme, it relied on Delaware contract law to assign a broad meaning to the terms in the severed clause, it relied on interpretive tools derived from rules to construct federal statutes not civil law contracts, and preferred to consult the *Restatements* on Contract rather than Puerto Rico law to justify its exclusion of competing contractual provisions. Cumulatively, these individual decisions comprising the First Circuit's holding evince contempt for Puerto Rico law and very likely produce a result that is

materially different from what a Puerto Rico court would have decided.

The First Circuit's holding represents a disregard for jurisdictions such as Puerto Rico that have a unique legal heritage compared to other jurisdictions where the application of general common law principles is less offensive. Regardless of how apt a general legal principle may be or how relevant a principle derived from another jurisdiction may be, *Erie* requires the law of the forum state to be applied.

The First Circuit did not have to "divine" Puerto Rico law in the instant case by consulting other authorities as Puerto Rico law presents a clear method of analysis for interpreting contract provisions. The First Circuit chose to disregard this methodology. It chose instead to rely on cases from other jurisdictions that, in some instances, did not even concern contract law. If allowed to stand, the First Circuit's opinion creates an incentive for parties to seek federal jurisdiction if they believe Puerto Rico law is unfavorable to them. Further, the opinion will have serious business consequences as parties will be unsure whether Puerto Rico law will govern their transactions or if general principles of common law will. Regardless, the First Circuit's decision is a serious affront to the doctrine established by *Erie*. This Court in *Erie* summarized its rationale with the following:

> [L]aw in the sense in which courts speak of it today does not exist without some authority behind it. The common law in so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in

> England or anywhere else. . . . *The authority and only authority is the State,* and if that be so, the voice adopted by the State as its own (whether it be of the legislature or of its Supreme Court) should utter the last word.

Erie v. Tompkins, 304 U.S. 64, 79 (1938) (emphasis added; quotations omitted). In the instant case, Puerto Rico's voice was not heard.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this honorable Court to grant the Petition.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 06-1332

IN RE: ADVANCED CELLULAR SYSTEMS, INC.;
ADVANCED PAGING SYSTEMS CORP.,

DEBTORS.

PUERTO RICO TELEPHONE COMPANY, d/b/a VERIZON WIRELESS, f/k/a CELULARES TELEFONICA, INC., f/k/a VERIZON WIRELESS PUERTO RICO, INC.

Creditor, Appellant,

v.

ADVANCED CELLULAR SYSTEMS, INC.;
ADVANCED CELLULAR PAGING SYSTEMS CORP.,

Debtors, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Salvador E. Casellas, Senior U.S. District Judge]

Before

Lynch, Circuit Judge,

John R. Gibson,* Senior Circuit Judge,

and Howard, Circuit Judge.

Ricardo F. Casellas, with whom Ricardo L. Ortiz Colón and Fiddler González & Rodríguez, P.S.C. were on brief, for appellant.

Carmen D. Conde Torres with whom C. Conde & Associates was on brief for appellee.

March 28, 2007

HOWARD, Circuit Judge. This appeal concerns a contract dispute that arose during the course of a bankruptcy proceeding. The debtor is Advanced Cellular Systems, Inc., a reseller of cellular telephone numbers and services in Puerto Rico. Through an arrangement with the Puerto Rico Telephone Company, Advanced Cellular purchased cellular services and telephone numbers from Puerto Rico Telephone at wholesale prices and resold them to consumers at retail prices. The relationship between Advanced Cellular and Puerto Rico Telephone was governed by a contract entered into in 1986 and by subsequent tariffs filed by Puerto Rico Telephone with the Puerto Rico Telephone Authority. In April 1998, Puerto

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Rico Telephone ended its relationship with Advanced Cellular because of Advanced Cellular's allegedly delinquent debts.

Thereafter Advanced Cellular filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code, and Puerto Rico Telephone filed a proof of claim for the disputed debt in the amount of $1,655,391.96. Advanced Cellular objected to this claim, asserting that, in fact, Puerto Rico Telephone owed Advanced Cellular money.[1] It based this objection on several grounds, including that Puerto Rico Telephone owed Advanced Cellular reimbursements in the sum of $1,334,204.62 for the fraudulent use of telephone numbers that it had purchased from Puerto Rico Telephone.

The type of fraud at issue is commonly referred to as cloning. Cloning occurs when a third party uses a device to steal the identifying information of an authorized cellular telephone number through the air waves and then uses the stolen information to make calls that appear to have originated from the authorized number. Cloning surfaced in the cellular telephone industry in the early 1990s. In response to this problem, which placed significant financial strain on Advanced Cellular and Puerto Rico Telephone's other resellers, Puerto Rico Telephone began to reimburse resellers for losses suffered from cloning. To receive reimbursements, Puerto Rico Telephone required resellers to submit claims within 90 days of billing.

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[1] The bankruptcy court limited its consideration of Advanced Cellular's objection to whether it owed funds to Puerto Rico Telephone. The court dismissed without prejudice Advanced Cellular's claim that Puerto Rico Telephone owed it money.

During the course of their relationship, Advanced Cellular received over $5,750,000 in reimbursements for cloning from Puerto Rico Telephone. The dispute in this case centers on $1,334,204.62 in claims made by Advanced Cellular that Puerto Rico Telephone had denied because they were filed outside of the 90-day window. Before the bankruptcy court, Puerto Rico Telephone claimed that it had no contractual obligation to reimburse Advanced Cellular for cloning claims at all, and therefore had the discretion to deny claims that were untimely. Advanced Cellular countered that Puerto Rico Telephone was contractually responsible for losses incurred due to cloning and that the 90-day claim window was arbitrary and unreasonable.

The bankruptcy court agreed with Advanced Cellular. It concluded that the parties' agreement did not have a specific provision regarding cloning but that Puerto Rico Telephone had a contractual duty to maintain and operate the cellular network. The court determined that this duty included an obligation to take responsibility for cloning. It also concluded that it "defied common sense" to believe that Puerto Rico Telephone would have reimbursed over $5 million of cloning claims made by Advanced Cellular if there were no obligation to do so. Finally, the court ruled that the 90-day window for reimbursement claims was unreasonable and that Puerto Rico Telephone "had a duty . . . to allow Advanced Cellular a reasonable time, such as 120 days, to submit their [sic] fraud claims." The court

accordingly disallowed Puerto Rico Telephone's proof of claim.[2]

Puerto Rico Telephone appealed to the district court, which affirmed. The district court addressed a provision of the tariff not explicitly mentioned by the bankruptcy court that provided that Advanced Cellular "shall be solely responsible for any . . . fraudulent use, by any person, of any number or numbers assigned" to it. The court interpreted this provision to apply only to fraud committed by "authorized users" of numbers assigned to Advanced Cellular. Because cloning is fraud conducted by unauthorized third parties, the court concluded that this provision did not govern. The court also concluded that this provision could not apply to cloning because Advanced Cellular's relationship with Puerto Rico Telephone had commenced in 1986, which was at least five years before cloning emerged as a problem in the cellular telephone industry.

Having concluded that the fraudulent use provision did not apply, the district court adopted the bankruptcy court's rationale that Puerto Rico Telephone was responsible for cloning because of its contractual obligation to operate and maintain the cellular network and because of its actions in reimbursing sellers for cloning losses. The court also upheld the bankruptcy court's ruling that the

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[2] While the cloning fraud issue accounted only for $1,334,204.62 of the $1,655,391.96 that Puerto Rico Telephone claimed, the bankruptcy court concluded that Advanced Cellular was entitled to other credits in the sum of $709,277.04. It therefore held that Advanced Cellular was entitled to a total credit of $2,043,480.27, which exceeded Puerto Rico Telephone's entire claim. The rulings that resulted in the $709,277.04 credit in favor of Advanced Cellular have not been appealed.

90-day filing window was unreasonable because Puerto Rico Telephone could not "unilaterally condition its own preexisting obligation" to assume responsibility for cloning. Puerto Rico Telephone timely appealed.

We review the bankruptcy court's findings of fact for clear error and its rulings of law de novo. *Palmacci* v. *Umpierrez,* 121 F.3d 781, 785 (1st Cir. 1997). In so doing, we provide "no particular deference" to the district court's conclusions. *In re Healthco Int'l, Inc.,* 132 F.3d 104, 107 (1st Cir. 1997).

The validity of Puerto Rico Telephone's proof of claim rests primarily on the plain meaning of the relevant tariff, and so we look to Puerto Rico law to guide our analysis. *See Raleigh* v. *Ill. Dep't of Revenue,* 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims.") (citing *Butner* v. *United States,* 440 U.S. 48, 57 (1979)). Puerto Rico Telephone argues, as it has throughout this litigation, that the tariff's fraudulent use provision unambiguously placed the risk of loss from cloning on Advanced Cellular. As the parties agree that the tariff binds them, we turn to consider this provision.

The tariff provides that Advanced Cellular, as a reseller, "shall be solely responsible for any . . . fraudulent use, by any person, of any number or numbers assigned to" it. Cloning is a form of "fraudulent use" as it involves a misstatement by a third party that the party is an authorized user of a cellular telephone number; cloning is conducted by "any person," *cf. DIRECTV, Inc.* v. *Budden,* 420 F.3d 521, 528 (5th Cir. 2005) (describing the phrase "any person" as broad); and cloning involves the making of telephone calls by third parties impersonating authorized

users of "numbers assigned to" Advanced Cellular. Under this plain reading of the fraudulent use provision, Advanced Cellular assumed responsibility for losses from cloning.

Advanced Cellular offers several unavailing arguments in an attempt to undermine this straightforward reading of the fraudulent use provision.[3] First, it points out that its relationship with Puerto Rico Telephone began in 1986, before cloning had surfaced as a problem. Based on this fact, it argues that the fraudulent use provision cannot be interpreted to reflect an intent to assign responsibility for losses from cloning. While it is true that the parties' initial agreement was signed in 1986, the tariff was not filed until 1994, after cloning had emerged. Moreover, even if the risk of cloning was unanticipated when the tariff was adopted, Advanced Cellular agreed to broadly assume the risk of all fraudulent use. If Advanced Cellular meant to agree to assume a narrower risk, it was incumbent upon it, especially as a sophisticated party, to make the limitation clear. *See MBIA Ins. Corp.* v. *Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005) (where sophisticated parties include broadly worded clauses in contracts, courts will likely assume that they "said what they meant and meant what they said").

Second, Advanced Cellular contends that the fraudulent use provision was intended to apply only to fraud perpetrated by "authorized users" of the cellular numbers assigned to it and therefore does not cover cloning perpetrated by unauthorized third parties. The fraudulent use

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[3] We reject Advanced Cellular's contention that Puerto Rico Telephone waived reliance on the fraudulent use provision. The argument was squarely raised in the bankruptcy and district courts.

provision does not, however, refer to "authorized users" but rather to "any person," a term with a common meaning broad enough to encompass fraud committed by third parties. *See Metlife Capital Corp.* v. *Westchester Fire Ins. Co.*, 224 F. Supp. 2d 374, 382 (D.P.R. 2002) (stating that under Puerto Rico law contractual terms should generally be assigned their common meanings). Indeed, the phrase "authorized user" appears in other provisions of the tariff, which strongly suggests that this was not the intended meaning of "any person" in the fraudulent use provision.

Third, according to Advanced Cellular, the fraudulent use provision was meant to apply only to losses from stolen cellular telephones. This argument fails because the tariff contains a specific provision directly related to stolen telephones.[4] It is well-established that courts should avoid interpretations that render a provision of an agreement surplusage. *See Restatement (First) of Contracts* § 236 (1932). To interpret the fraudulent use provision to apply only to losses from stolen cellular telephones would violate this principle because it would render the provision directly related to the issue meaningless.

Fourth, Advanced Cellular asserts that a provision in the 1986 agreement concerning Puerto Rico Telephone's responsibility for maintaining the cellular network makes it liable for cloning. The provision states, in relevant part, that Puerto Rico Telephone is responsible for "mistakes, omissions, interruptions, delays, errors or defects in transmission" that result from its failure "to maintain

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[4] Under this provision, Advanced Cellular was responsible for losses from stolen telephones until it informed Puerto Rico Telephone of the loss.

proper standards of maintenance and operation" of the cellular network. Through this provision, Puerto Rico Telephone appears to have taken responsibility for technical problems in service. Cloning by third parties is different in kind from these sorts of difficulties, as it is the product of wrongful human conduct, not a system malfunction. In any event, the network maintenance provision does not specifically cover losses from fraudulent use, and therefore, the provision that speaks directly to this issue governs. *See Bank* v. *IBM Corp.*, 145 F.3d 420, 427-28 (1st Cir. 1998).

Finally, Advanced Cellular relies on Puerto Rico Telephone's policy of reimbursing timely cloning fraud claims from resellers to argue that Puerto Rico Telephone was contractually obligated to provide such reimbursements. It contends that this evidence shows the parties' intent because Puerto Rico Telephone would never have reimbursed such claims unless required to do so by contract.

Under Puerto Rico law, "[i]f the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed." P.R. Laws Ann. tit 31, § 3471. Consequently, a court may not consider extrinsic evidence at all, if it finds that the terms of an agreement are clear. *Borschow Hosp. & Med. Supplies, Inc.* v. *Cesar Castillo, Inc.*, 96 F.3d 10, 15 (1st Cir. 1996); *Vulcan Tools of P.R.* v. *Makita U.S.A., Inc.*, 23 F.3d 564, 567 (1st Cir. 1994). An agreement is clear when it can "be understood in one sense alone, without leaving any room for doubt, controversies or difference of interpretation." *See Catullo* v. *Metzner*, 834 F.2d 1075, 1079 (1st Cir. 1987) (internal citation omitted).

As discussed above, Advanced Cellular unambiguously assumed the risk of losses from cloning through the tariff's fraudulent use provision. Therefore, extrinsic evidence is not admissible to assist in the interpretation of the provision.[5] *See Mercado-Garcia* v. *Ponce Fed. Bank,* 979 F.2d 890, 894 (1st Cir. 1992). In a similar circumstance, we affirmed the exclusion of extrinsic evidence of a party's attempt to accommodate the other by not enforcing clear contractual terms. *See Executive Leasing Corp.* v. *Banco Popular de P.R.,* 48 F.3d 66, 69 n.5 (1st Cir. 1995). We determined that, because the meaning of the contract at issue was clear on its face, the party's subsequent conduct was not admissible to alter the contract's unambiguous terms. *Id.* So too here.[6]

In sum, the tariff's fraudulent use provision unambiguously placed the risk of loss from cloning on Advanced Cellular, and it was error to credit Advanced Cellular for the cloning claims not reimbursed by Puerto Rico Telephone. We

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[5] Advanced Cellular argues only that Puerto Rico Telephone's conduct in reimbursing cloning claims is relevant to interpreting the contract. It does not argue that this conduct demonstrated a modification or other alteration of the parties' agreement.

[6] Even were we to consider extrinsic evidence concerning Puerto Rico Telephone's conduct in reimbursing cloning claims, we do not think that it bears the weight placed upon it by the bankruptcy court. There was evidence that cloning fraud was causing Puerto Rico Telephone's resellers substantial financial difficulties. Even though not contractually obligated to do so, it would not "def[y] common sense" for Puerto Rico Telephone to assume losses stemming from cloning in the hope of forestalling its resellers from suffering crippling losses that could force them out of business.

therefore ***vacate*** the judgment and ***remand*** for further proceedings consistent with this opinion.[7]

So ordered.

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[7] Puerto Rico Telephone argued in its brief that we should decide the legal significance of an alleged admission by Advanced Cellular that it owed Puerto Rico Telephone in excess of $700,000. At oral argument, Puerto Rico Telephone conceded that this claim had not been resolved by the bankruptcy court and therefore should not be decided as part of this appeal. Puerto Rico Telephone may pursue this argument on remand.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PUERTO RICO TELEPHONE COMPANY, CELULARES TELEFONICA, INC.	*	
Appellants	*	**Civil No. 02-1908(SEC)**
v.	*	
ADVANCE CELLULAR SYSTEMS, INC., ADVANCE CELLULAR PAGING SYSTEMS, CORP.	*	
Appellees	*	

* * * * * * * * * * * * * * * * *

OPINION AND ORDER

Pending before the Court is Puerto Rico Telephone Company and Celulares Telefonica, Inc.'s (herein "Appellants" or "PRTC") appeal of the Bankruptcy Court's Opinion and Order of March 12, 2002 in Case No. 98-07437(ESL) consolidated with Case No. 98-07438(ESL) (Docket # 13, Ex. 5). PRTC has filed its brief on appeal (Docket # 13) and Advance Cellular Systems, Inc./Advance Cellular Paging Systems, Corp. (herein "Appellees" or "ACS") has filed its brief in opposition (Docket # 18). PRTC replied (Docket # 20) and ACS sur-replied (Docket # 24). After carefully considering the parties' filings and the applicable law, for the reasons set forth below, we **AFFIRM**.

Procedural Background

On September of 1986 PRTC and ACS entered into a Wholesale Service Agreement (herein "the Agreement")

under which ACS became a reseller of PRTC's cellular telephone numbers and services through the PRTC cellular network (Docket # 13, JAPP 0158-0172). However, on April 1, 1998, due to an alleged debt, PRTC disconnected the services of ACS (Docket # 18 at p. 4). Then, on May 29, 1998, ACS filed for bankruptcy under Chapter 11 of the Bankruptcy Code (Docket # 18 at p. 4). On September 16, 1998, PRTC timely filed a Proof of Claim, Proof of Claim No. 18, for the amount of $1,655,391.96 (Docket # 13, JAPP 0020-0021). On December 23, 1998, ACS filed an objection to said Proof of Claim (Docket # 13, JAPP 0022-0023). After an evidentiary hearing, the Bankruptcy Court issued an Opinion and Order deducting certain amounts from PRTC's Proof of Claim and further disallowing the claim in its entirety (Docket # 13, JAPP 0783-0792). Specifically, the Bankruptcy Court held that: (1) inasmuch as PRTC had control over its cellular network and a duty to maintain the same, PRTC had a duty to make adjustments for fraud claims and "to allow ACS a reasonable time, such as 120 days, to submit their fraud claims;" (2) ACS made payments in excess of the amounts credited by PRTC during the period from 1993 to 1998; (3) PRTC overcharged ACS by improperly rounding the air time of calls to six seconds; and (4) PRTC improperly retained the billing tapes for periods over which ACS provided services to its customers, preventing ACS from billing its customers (Docket # 13, JAPP 0792). Accordingly, the Bankruptcy Court found that since the amount to be credited to ACS (i.e. $2,043,480.27) exceeded the amount of PRTC's claim (i.e. $1,655,391.96), the Proof of Claim would be disallowed in its entirety.

PRTC appeals from said Opinion and Order alleging that the Bankruptcy Court erred by: (1) finding that PRTC

had a duty or contractual obligation to deduct all claims for cellular fraud from the amounts due by ACS; (2) determining that ACS's fraud claims were unfairly or unreasonably denied by PRTC; (3) making a set-off of the alleged credits and the proof of claim; (4) failing to give weight to ACS's admission of liability of certain sums owed to PRTC in the proof of claim; (5) finding that ACS had made payments which were not credited by PRTC; (6) determining that PRTC illegally retained, or had an obligation to return to ACS, the billing tapes after the termination of the agreement; and (7) deciding that PRTC failed to maintain adequate control to prevent fraudulent usage of its network (Docket # 13).[1] We will address each of these arguments to the extent that it becomes necessary in the same order followed by the Opinion and Order subject of this appeal.

Standard of Review

When reviewing the decision of a bankruptcy court, a district court reviews the bankruptcy court's factual findings, whether based on oral or documentary evidence, under the clear error standard, and its conclusions of law *de novo*. Rule 8013 Fed.R.Bankr.P.; *See In re G.S.F. Corp.*, 938 F.2d 1462, 1474 (1st Cir. 1991); *Matter of Torres Lòpez*, 138 B.R. 348, 349 (D.P.R. 1992). A factual finding is "clearly erroneous" only when the appellate court is left

[1] The Court notes that PRTC has failed to present any arguments contesting the Bankruptcy Court's finding that PRTC overcharged ACS by incorrectly rounding the air time usage of calls. Per said finding, the Bankruptcy Court credited ACS in the amount of $300,062.95. Having failed to present any arguments on that respect, we hold that PRTC has waived their right to appeal said matter. *See* Docket # 18 at p. 11.

"with the definite and clear conviction that a mistake has been committed." *In re the Bible Speaks,* 869 F.2d 628, 630 (1st Cir. 1989) (*quoting Anderson v. Bessermer City,* 470 U.S. 564 (1985)). "However, two or more permissible views of the evidence preclude[s] a finding of clear error." *In re Advance Cellular Systems, Inc.,* 262 B.R. 10, 13 (D.P.R. 2001) (citations omitted). As such, the district court shall give due weight to the opportunity of the bankruptcy court to judge the credibility of the witness. Rule 8013 Fed.R.Bankr.P. The district court may then affirm, modify, or reverse a bankruptcy court's judgment or order, or may remand the case for further proceedings.

Applicable Law and Analysis

1. Fraud Claims

During the course of the business relationship between PRTC and ACS the existence of fraud in the cellular service market surfaced, affecting said relationship. This fraud consisted mainly of the theft of the cellular signal and the use of this signal to make unauthorized calls through active phone numbers, evading payment for the same. When ACS's clients requested a credit for these fraudulent calls, ACS would credit them and would proceed to request from PRTC a credit for the same. While PRTC granted over $5,000,000 in fraud credits to ACS, it denied ACS's fraud claims amounting to $1,334,204.62. ACS has therefore objected to PRTC's proof of claim alleging that out of the $1,655,391.96 claimed by PRTC, $1,334,204.62 corresponded to unfairly denied fraud claims.

After analyzing the provisions of the Agreement and applicable tariffs, the Bankruptcy Court found that the

fraud claims in question were a result of the unauthorized access to the PRTC network and that said type of fraudulent conduct was not taken into account by PRTC or ACS in the Agreement (Docket # 13, JAPP 0787). As such, the Bankruptcy Court concluded that since PRTC had control of its network, which implies the imposition of proper standards of maintenance and operation of the same, it was responsible for the costs of fraud claims (Docket # 13, JAPP 0789). The Bankruptcy Court reasoned that although no specific provision of the Agreement held PRTC accountable for cellular fraud claims, the fact that PRTC had provided credit adjustments in excess of five (5) million dollars evidenced PRTC's duty to make adjustments for said claims. This conclusion was accompanied by the Bankruptcy Court's finding that the ninety (90) day limitation period imposed by PRTC for its resellers to submit their fraud claims to PRTC was unreasonable and that, as such, ACS's fraud claims submitted past the 90-day deadline, were unfairly denied by PRTC (Docket # 13, JAPP 0789).

To this end, PRTC avers that the Bankruptcy Court erred by finding that: (1) PRTC had a duty to credit resellers for fraud claims; (2) PRTC was negligent in the maintenance of their network; and (3) PRTC's 90-day limitation period for resellers to file their fraud claim was unreasonable. In essence, PRTC alleges that the application of Puerto Rico law reveals that PRTC did not have a duty to credit fraud claims and that PRTC only granted fraud credits to ACS as a "good-faith gesture" in their contractual dealings. PRTC further argues that the Bankruptcy Court erred in disregarding the terms of the Agreement and by assuming that said good-faith gesture was simply not credible (Docket # 13 at pp. 17-18). Per the

standard delineated above, we review *de novo* the Bankruptcy Court's interpretation of the contractual relationship between PRTC and ACS and for clear error any findings of fact that follow. We agree with the Bankruptcy Court's holding and affirm its application of the fraud credits.

In its Opinion and Order, the Bankruptcy Court stressed that the two (2) documents governing the relationship between PRTC and ACS are the Agreement and the tariffs emitted thereunder (Docket # 13, JAPP 0787). This much remains uncontested. Thus, we take a close look at these documents. Section V(F) of the Agreement provides that PRTC will be held liable to ACS for any damages suffered, but only in an amount which shall not exceed an amount equivalent to the proportionate charge to ACS, as a result of:

> errors or defects in transmission, or failures or defects in facilities furnished by P.R.T.C., occurring in the course of furnishing CRS and not caused by the negligence of RESELLER or its authorized users, or of P.R.T.C. in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision.

(Docket # 13, JAPP 0164). On the other hand, the applicable tariff, in the pertinent part, states that "[t]he reseller [ACS] shall be solely responsible for all risks and expenses incurred in connection with its actions in the sale and service of the Cellular Service . . . [t]he reseller shall act be solely responsible for any . . . fraudulent use, by any person of any number or numbers assigned to the reseller." (Docket # 13, JAPP 1374). Per the foregoing language, it appears that while PRTC assumed liability for any defects in its network and for damages on account of any negligence in

the maintenance and operation of the same, ACS assumed all risks of the fraudulent use "by any person of any number(s)" assigned to it. That is, fraudulent use by authorized users. Therefore, a finding that the fraud in question occurred in the network or as a result of the improper maintenance and operation of the same was sufficient to impose liability on PRTC **at least** for "an amount equivalent to the proportionate charge to [ACS] for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission, or failure or defect in facility occurs." (Docket # 13, JAPP 0164). Holding ACS accountable for the costs of fraud as a result of "defects in [the] facilities furnished by PRTC" would be unwarranted.

Both parties agree that the fraud in question was not contemplated by either party at the time of entering into the Agreement. In fact, this type of fraud surfaced sometime in 1992-1993, five to six (5-6) years from the date of the Agreement (Docket # 13, JAPP 0984). The fact that when the parties entered into the Agreement this type of fraud was inexistent belies any possibility that the contractual clause that governs ACS's assumption of risk for fraudulent use includes the type of fraud that is at issue here.

Per the evidence in the record, the fraud consisted on the theft of the electronic serial numbers of cellular numbers assigned to authorized users and the subsequent phone calls made using said authorized users' numbers without authorization (Docket # 13, JAPP 0983, 1315). This theft occurred through the airwaves or air signals (Docket # 13, JAPP 1320). It follows, that although through authorized users' numbers, the fraud in question was committed by unauthorized users, that is, people who

hacked the network to steal the signal and make unauthorized calls. Therefore, the conclusion that the theft occurred in the network is not only reasonable but logical. It was the network, whether it be for the lack of adequate maintenance or operation or not, that allowed the unauthorized users to steal the signal from the airwaves and make the unauthorized calls.

Inasmuch as the fraud at issue here occurred in the PRTC network and that it was PRTC the one in control of the access to its network, logically, ACS cannot be held liable for said fraud. Naturally, ACS could not have controlled or prevented the fraud. It could only help, as it did, in the expedient investigation and reporting of the fraud claims to PRTC. As such, regardless of whether PRTC failed to timely and adequately prevent the fraud, failed to implant the necessary technology to battle the fraud more effectively, or negligently failed to maintain and operate the network, the fact of the matter is that the network belonged to PRTC and that it was PRTC who could have prevented said fraud.[2] As testified by Mr. Millàn, PRTC controls the access to its network (Docket # 13, JAPP 1333-1335). It follows then that absent a provision in the Agreement whereas ACS assumed the risk of fraud by unauthorized users, ACS was entitled to receive credits for

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[2] As to this issue, the Bankruptcy Court was faced with contradicting evidence: on the one hand, the Comptroller's Audit Report indicating negligence by PRTC in the maintenance and operation of the network and on the other hand, PRTC's witness, Mr. Millàn, who testified that PRTC had invested millions of dollars in the purchase and installation of fraud prevention technology. The Bankruptcy Court, which evaluated the evidence first hand, gave credibility to the Audit Report and not to Mr. Millàn's testimony. This is an issue of credibility which we will not disturb. *See* Docket # 13, JAPP 0175-0207 & JAPP 1321-1326.

fraud in the network. Furthermore, the fact that, by its own accord, PRTC granted more than $5,000,000 in fraud credits to ACS is credible evidence that PRTC recognized said obligation and that the fraud could not be attributed to ACS or its clients, ACS's authorized users. *See* Docket 13, JAPP 0900.

PRTC argues, however, that if in fact it was obliged to grant the fraud credits, ACS's failure to present said claims during the 90-day period forever foreclosed ACS from receiving credit for the reported fraud. The Bankruptcy Court found this term unenforceable, stating instead that "PRTC had a duty to make the adjustments for the fraud claims and to allow ACS a reasonable time, such as 120 days, to submit their fraud claims." The Bankruptcy Court's finding is not clearly erroneous, especially in light of the fact that ACS had to investigate the fraud claims prior to submitting the same for reimbursement to PRTC. Furthermore, normally it took PRTC more than 90 days to process the claims and give credit to ACS. Thus, ACS was granting its own clients credits for fraud claims even before receiving credit for the claims itself.

We add, moreover, that PRTC was obliged to provide the fraud credits as the fraud was a result of the fraudulent and unauthorized use of its own network, which it operated and maintained. As evidenced at the hearings held by the Bankruptcy Court, the 90-day term was a "policy statement" imposed by PRTC, which ACS did not negotiate with PRTC. PRTC could not then unilaterally

condition its own preexisting obligation.[3] Accordingly, the Bankruptcy Court's decision to disallow PRTC's proof of claim in the amount of $1,334,204.62 is **AFFIRMED**.

2. Crediting Payments

ACS also objected to PRTC's proof of claim alleging that PRTC failed to apply certain payments made by ACS to its account. These payments amount $353,674.82. PRTC alleges that the Bankruptcy Court erred in disallowing its proof of claim in this amount. To this end, the Bankruptcy Court found that ACS could account for all its payments, including those not credited to its account, and that PRTC was not able to do the same. This is a determination of fact made by the Bankruptcy Court which we review for clear error.

An examination of the trial transcript and evidence in the record reveals that ACS presented specific evidence of all the payments made by ACS and the payments credited to the ACS account by PRTC. In fact, even though PRTC heavily objected to the evidence presented by ACS in support of this claim it presented no rebuttal testimony to Mr. Negrette's testimony pertaining to the difference between the payments made by ACS and those which were credited to the ACS account by PRTC. The Bankruptcy Court then logically relied on Joint Exhibit # 4 and ACS's Exhibits G & H which showed that approximately

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[3] Moreover, there is no evidence that ACS agreed, or in any way obliged itself, to the 90-day term. Instead, Mr. Negrette's testimony was that ACS merely complied to the best of its capacity with the term in order to receive the credits and that ACS, on occasion, expressed its difficulty to comply with said term and requested an enlargement. *See* Docket # 13, JAPP 1067.

$353,000 were paid by ACS and were not applied to the ACS account. Specifically, ACS's exhibits compared all payments made by ACS and all payments credited to the ACS account. The difference, per Mr. Negrette's testimony, represents the payments not credited to ACS. Inasmuch as the Bankruptcy Court found Mr. Negrette's testimony credible and most of the information included in the payment charts prepared by Mr. Negrette and admitted into evidence, especially the information pertaining to the payments credited, was provided by PRTC during discovery, no clear error was committed. *See* Docket # 13, JAPP 1101-1103, 1140. As such, we will not disturb the Bankruptcy Court's finding. There was sufficient evidence on the record to conclude that ACS made payments in an amount of $353,674.82 which were not credited to their account. Accordingly, we **AFFIRM**.

3. Obligation to Submit Billing Tapes after Disconnection & ACS's Admission of Liability

Finally, PRTC submits that the Bankruptcy Court erred in crediting ACS $55,537.00 due to PRTC's decision to retain the billing tapes of calls made from April to July 1998 and failed to recognize PRTC's right to the recovery of an amount of $800,000 due to ACS's alleged admission of liability. The Court sees no need to address these two arguments.

PRTC submitted a proof of claim of $1,655,391.96. The Bankruptcy Court determined, and we affirm, that ACS was entitled to credit for fraud claims totaling $1,334,204.62, credit for payments made and not credited to the ACS account of $353,674.82 and credit for incorrect rounding of air time usage of $300,062.95. These credits alone amount

to $1,987,942.39. Since the credited amount already exceeds PRTC's proof of claim there is no need for the Court to address PRTC's last two arguments. The fact that upon a breach PRTC could potentially prove that it was entitled to retain the billing tapes or that ACS admitted to liability in an amount of $800,000 has no bearing on the credits adjudicated above.

Conclusion

For the reasons set herein, the Bankruptcy Court's Opinion and Order of March 8, 2002 is **AFFIRMED**. Judgment shall be entered accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 9th day of January, 2006

S/ Salvador E. Casellas
SALVADOR E. CASELLAS
U.S. Senior District Judge

UNITED STATES BANKRUPTCY COURT
District of Puerto Rico

IN RE:	
ADVANCED CELLULAR SYSTEMS, INC.	**CASE NO. 98-07437 ESL**
	Chapter 11
Debtor	
IN RE:	
ADVANCED PAGING SYSTEMS, CORP.	**CASE NO. 98-07438 ESL**
	Chapter 11
Debtor	

OPINION AND ORDER

(Entered Mar. 12, 2002)

The above captioned cases came before the court for an evidentiary hearing to consider debtors' objection to the allowance of the proof of claim filed by the Puerto Rico Telephone Company and Celulares Telefónica, Inc.(PRTC). PRTC filed proof of claim number 18 in the amount of $1,655,391.96 as an unsecured non priority claim. PRTC claims that debtors owe the amounts specified in the proof of claim for services rendered in accordance with the written agreement between the parties. PRTC contends that it applied the tariffs that were valid and correct for each period in question and that it was under no contractual obligation to deduct claims for the fraudulent use of lines. The debtors contend that the amounts are not owed and that, to the contrary, PRTC owes them $2,646,319.56. The court limited the contested matter to the objection to the proof of claim and denied without prejudice presenting

evidence on debtors' claim against PRTC. Debtors' objection to the proof of claim rests on the following grounds: 1. PRTC's failure to provide adequate maintenance of its system and failure to establish adequate controls led to fraudulent use of cellular lines which resulted in failure to credit the amount of $1,334,204.00 in fraud claims; 2. PRTC did not credit $333,674.00 paid by the debtors; 3. PRTC overbilled debtors for air time usage during 1993 and 1996 to 1998 by improper air-time rounding in the amount of $300,062.95; and, 4. PRTC retained the billing tapes from April to July 1998, for an amount of $55,537.00, preventing debtors from billing their clients. Advanced Cellular System (ACS) alleges that since the sum total of the above credits exceeds the claim by PRTC, no amounts are owed.

Uncontested Facts

The parties agreed to the following uncontested facts in the pretrial report:

1. The parties limited the contested matter to invoices and payments during the period from 1993 to 1998.

2. Advanced Cellular System (ACS) is a corporation duly organized in the Commonwealth of Puerto Rico since 1986. Advanced Cellular engages in the services from licensed carriers and resells numbers and services to corporate customers.

3. PRTC/Celulares Telefónica is a corporation duly organized in the State of Delaware and is authorized to do business in Puerto Rico. PRTC/Celulares Telefónica is duly licensed by the Federal Communications Commission as a

local exchange carrier in Puerto Rico for local and continental United States [cellular services]. PRTC/Celulares Telefónica also provides commercial mobile radio services.

4. During the period of time relevant to this action, 1993 to 1998, Celulares Telefónica de Puerto Rico has been an affiliated and/or unincorporated division of the Puerto Rico Telephone Company, with PRTC/Celulares Telefónica having integrated ownership. Celulares Telefónica is a commercial mobile radio service provider for cellular services for wholesale and corporate customers.

5. In 1986 Advanced Cellular and PRTC/Celulares Telefónica subscribed a Wholesale Service Agreement.

6. During the period of 1993 to 1997 ACS had nine (9) operating accounts with PRTC.

7. PRTC had two billing cycles.

8. ACS' accounts with PRTC/Celulares Telefónica are identified as follows:

Operating Accounts	Miscellaneous Accounts
080-6000	080-9960
080-0600	080-9961
080-0660	080-9962
080-6001	080-9963
080-6060	080-9964
070-6060	070-9960
070-6161	070-9961
070-6262	070-9962
070--2020	070-9920

9. PRTC disconnected services to ACS on April 1, 1998.

The Agreement

On September 22, 1986 Advanced Cellular System Corp. entered into a "Wholesale Service Agreement Cellular-Radio Service" with the Puerto Rico Telephone Company. The "Agreement" granted ACS the right to resell cellular telephone numbers and services for PRTC's cellular network, and is made a part hereof as Appendix I. The agreement was supplemented at various times to include the applicable tariffs, Joint Exhibit 2.

The Evidence-PRTC

Celia López Zayas

Ms. Celia López Zayas, Customer Services Coordinator for the PRTC, was in charge of the ACS account since 1994. She participated in the preparation of the proof of claim submitted by the PRTC, Joint Exhibit No. 5. According to her testimony all payments made by ACS were credited, and the proof of claim reflects the balance owed. Exhibit #1 for PRTC is the evidence of payments made by ACS, organized by year, and comprising the period from 1993 to 1998. Joint Exhibit #4 includes the invoices from 1993 to 1998, the payments credited, and a compilation of the same. Joint Exhibit #4 shows a total debt of $1,628,790.34, excluding the balances in the miscellaneous accounts. The amounts owed, including the miscellaneous accounts, is $1,655,391.96. She explained that Joint Exhibit #4 shows a total debt of $1,628,790.34, and clarified that the debt as of today, and as specified in the proof of claim is $1,655,391.66, because the chart is up to July 1998 and the proof of claim is as of the filing date, September 1998.

Ms. López testified upon cross examination that (1) the compilations in Joint Exhibit #4 were not supported by a separate log of claims; (2) ACS was not notified how the payments were applied; (3) the invoices showing the payments made do not include the check number nor the particular amount applied; and (4) the total payments credited on the invoice were the totals for the particular billing cycle. She admitted that the checks through which ACS made payments were numbered and included a detail of the accounts to which particular amounts were to be applied.

Ms. López stated that the compilations submitted by the PRTC in support of the proof of claim were prepared by the Finance Department upon information provided by the Customer Services Department. The posting of payments received from ACS were summarized in a payment report but she knows of no separate log for posting individual payments. In fact, she acknowledged that the invoices only show the total amount credited to a reseller for a particular billing cycle, but did not include the number of check or the individual amount. She then acknowledged, when shown PRTC Exhibit #1, that the cheeks from ACS were sent with a cover letter detailing their application, and that they were posted to a cash receipt journal, but that the invoices stated total amounts credited, and the detail was not included.

Ms. López explained the procedure followed by PRTC to process fraud claims. Fraud claims submitted within ninety days from the invoice date were referred to the Systems Control Area. The claims would be transferred to a miscellaneous account that would not reflect the amounts transferred as either a late claim or arrears in payment. The fraud claims would be investigated and

when the investigation was concluded the miscellaneous account would be credited. Amounts not credited would be re-transferred to the operating account to be charged to the reseller, that is, ACS.

Ms. López knew of complaints by ACS for fraud claims but was not aware of the continuous complaints by ACS for over billing, disconnected lines, duplicate charges, billing of calls to Santo Domingo due to same area code as Puerto Rico (809) and damaged invoice tapes. These complaints were not referred to her and she was not made aware of them upon her arrival to the department. She failed to remember the complaints even after being shown letters addressed to her. (Joint Exhibits 32, 39, 40- 48,66, and 67). She identified Joint Exhibit #12 as a compilation of claims processed but clarified that she did not participate directly in its preparation, that the same was prepared by clerks in the Customer Services Department, and that her role as coordinator was only to channel the claims. The exhibit includes claims for deactivated lines that continue to generate consumption. She knows that the compilations reflect the invoices as they appear in the several boxes for claims by ACS. She stated that the compilations show the amount of $5,481,411,.05 credited to ACS for fraud claims, of a total of $6,165,385.53 submitted, leaving a balance of $628,789.77 denied.

Ms. López was not aware of Joint Exhibit #6, which includes requests for credit on account of charges for disconnected lines. She does not know if a charge of $29,560.96 included in the proof of claim as part of a miscellaneous account was credited, adjudicated, or not investigated.

Ms. López clarified, upon cross-examination, that the processing of fraud claims was computed based on average consumption due to the high volume, and that, after the credit was given and shown in an invoice, the detail was not provided to ACS. She also clarified that the period of 90 days from the date of invoice to process claims started at the end of 1994. She processed the fraud claims that were within 90 days of the date of the invoice, not from the date they were received or the date that the invoice tape was provided.

Raúl Rios González

Mr. González is currently the Finance manager for PRTC, was manager for invoice and credits during 1996-1998, and was an internal auditor for approximately seven years. He was responsible for the ACS account. One of his primary concerns was collecting a debt which ACS had in 1996 for approximately $1,600,000.00, as well as the processing of pending ACS fraud claims.

The billing process for PRTC was handled by the Cincinnati Bell Information System (CBS). CBS would process the billing cycles and submit them to PRTC for approval, who, in turn, would send them to their clients, together with supporting tapes that the resellers would use to bill their own clients.

Mr. González coordinated a series of payment plans for ACS in order to reduced the aging of accounts over 90 days owed by ACS. The invoicing of services according to the 1986 agreement was for air-time service and monthly rental for active lines. The payment was due 90 days after invoicing. He met personally with Mr. Cesar Negrette, president of ACS, to establish a payment plan adjusted to

the billing cycle of ACS. ACS continuously failed to comply with the payment plans, payments were late and sometimes for an amount less than the invoiced amount. The average balance, excluding fraud claims pending adjudication, averaged $1,500,000.00. This amount is in agreement with the collection efforts shown in the following joint exhibits: 22, 23, 24, 26, 27, 28, 29 and 30.

Regarding fraud claims, a letter dated November 25, 1996 (Joint Exhibit #23) shows that the amount credited for fraud claims was based on an interim discount of 30%. The percentage was reduced to 25% on January 30, 1997 (Joint Exhibit #24) as new technology was in place. Finally, on October 9, 1997, the period of 90 days to process fraud claims was established by PRTC. PRTC believed the period was reasonable as two new technologies, Phone Print and Authentication, had been implemented.

Management of PRTC made the decision to terminate the 1986 agreement and disconnect the lines at the end of March 1998. Mr. Rios informed Mr. Negrette of the decision. At a meeting Mr. Negrette informed him that of the $1,500,000.00 balance, approximately $700,000.00 was contested. Mr. Negrette proposed to pay the balance, less the $700,000.00, through a contract with PRTC for collection of debts from other clients.

Upon cross-examination Mr. Rios acknowledged that Mr. Negrette brought the issue of the fraud claims on each occasion they met or discussed the pending balances owed by ACS to PRTC. However, his primary concern was in collecting the amounts owed as the fraud claims were under investigation and were not reflected as arrears until they were denied. He also admitted that the billing tapes

were not submitted to ACS after the contract was terminated on April 1, 1998 and the lines were disconnected.

Mr. José C. Millán Rivera

PRTC brought as a rebuttal witness Mr. José C. Millán Rivera, an electrical engineer who worked for PRTC during the years in question. He was presented to rebut allegations of lack of adequate control of the PRTC cellular network. Mr. Millán testified that cellular fraud appeared since 1989, and PRTC installed equipment to control it. Amongst the measures adopted was the installation of PIN, which added a third element to get access to the system. The PIN was unique to the telephone unit. This measure minimized cellular fraud. He does not remember when the PIN system was actually installed, but remembers it was acquired in either 1992 or 1993. The cellular fraud increased from 1992 to 1995 in spite of the PIN system. Subsequently they invested approximately $1.7 million dollars to acquire a clone detector, which was installed in 1995. Thereafter they acquired "Phone Print," at an approximate cost of four million dollars, and which was the system that really prevented fraud because it was around 95% effective. This was at the end of 1996. In 1997 they acquired "Authentication," which was 100% effective.

The Evidence-ACS

ACS relied on the testimony of its president, Mr. Cesar Negrette and the documentary evidence in support thereof.

Mr. Cesar Negrette

Mr. Negrette is the president and founder of ACS. He holds a BA degree from George Washington University and an MBA from Harvard University.

ACS has been a reseller of cellular telephones for PRTC since 1986. ACS buys at wholesale prices from PRTC and resells the service to customers at a retail price. The relation between the parties is governed by a contract, titled "Wholesale Service Agreement" signed in September 1985, Joint Exhibit #1. ACS purchases wholesale, or at a large volume, from the PRTC network. In order to understand the nature of the business, he relates to the following definitions in the "Wholesale Service Agreement":

- *Access number* – A telephone number provided to RESELLER by P.R.T.C. and associated with RESELLER's or its authorized user's mobile radio unit, enabling use of the cellular system.
- *Air time Usage* – The time measured in minutes during which RESELLER or its authorized user utilizes the cellular system.
- *Authorized User* – A person, corporation or other entity that is authorized by RESELLER to use the CRS (Cellular Radio Service) purchased by RESELLER from P.R.T.C.

Pursuant to the agreement the "UNDERTAKINGS OF P.R.T.C." are as follows:

> P.R.T.C. undertakes to provide the services outlined in this Agreement under the terms and conditions specified herein and in all applicable tariff filings. Any additional or varying terms, conditions or rates offered by P.R.T.C. or its authorized agents are null and void and are not

part of the undertaking of P.R.T.C. unless otherwise specified in this agreement or the approved tariff.

P.R.T.C.'s undertaking is dependent upon its availability to obtain, retain and maintain, without unreasonable expense, suitable facilities, licenses and rights for the construction and maintenance of the necessary circuits and equipment.

Joint Exhibit #2 is a composite exhibit which shows the tariffs set by the Autoridad de Teléfono for the years from 1993 to 1998. The tariffs from March 1, 1992 to June 26, 1994 are the same. These are the tariffs referred to in paragraph VII of the agreement, and which are the obligation of the RESELLER to pay PRTC for its air time usage. The current tariff for 1993, up to July 24, 1993 is 24¢ a minute, and from July 25, 1993 on, 22¢ a minute.

The agreement and the tariffs are the two basic documents governing the relation between ACS and PRTC. The relations between the parties were good until 1993 when ACS began experiencing problems, particularly due to cellular fraud. Mr. Negrette testified as to the problems encountered by ACS with PRTC's billing, including the following: duplicated calls, fraud claims, incorrect roaming charges (JE #33); billing tapes not readable (JE #34,35,42); errors in the tapes (JE#36); errors in billing by CBS (JE# 37); tax for 911 service to disconnected lines (JE#38); duplicate invoicing of calls (JE# 39,47); change in area code billing errors (JE# 40,41,43,44,46); and fraud claims (JE# 55,56,57).

The PRTC provided continuous cellular network services until March 31, 1998. There is no question that ACS is liable to PRTC for legitimate services provided.

The evidence shows that ACS was continuously in arrears since 1992 and that several payment plans were made by PRTC to cure the arrears. ACS consistently failed to comply with the plans. However, during the same period, ACS continuously made claims to PRTC for adjustments. These claims were never finally settled.

Joint Exhibit number 6 compiles the claims presented by ACS to PRTC from 1993 to 1998 for fraud claims and billing errors.

The main problem in the arrears incurred by ACS was the fraud claims. These concerned unauthorized access to PRTC network by unauthorized users. The agreement refers to authorized users, and fraudulent users are not authorized users. The fraudulent conduct by users was not authorized by either ACS or PRTC. PRTC, as the carrier, had control of access to its network. Fraud started in 1993 and continued to grow until 1996, when it reached 35% of total billings, a percentage deemed to be extremely high. Fraud started to decline in 1997 due to new technology installed by PRTC. At the same time, from 1996 to 1997, a new kind of fraud emerged, the use of deactivated lines.

Fraud claims caused significant losses to ACS' operation. ACS credited the customer for the fraud claim but could not recoup the same because it was not provided by PRTC with a detail of rejected claims. ACS would give the credit to its client before the PRTC gave ACS credit for the fraud claim. The fraudulent use of the network was the main problem with PRTC (Joint Exhibits# 4,6).

Fraud Claims Not Credited

Mr. Negrette prepared a chart, Exhibit #A, showing in summarized form the charges made by PRTC for fraudulent use of disconnected lines. The information was obtained from Joint Exhibit #12, provided by PRTC, which compiles the documents in box number 31 of the documents submitted by PRTC as part of discovery. The total amounts for these claims is $145,907.28. Mr. Negrette also prepared a chart of fraud claims submitted to PRTC, Exhibit #B. The chart was prepared from the information in Joint Exhibit #6, which compiles the fraud claims by account number and year. The total amount in Exhibit #B is $ 7,222,229.45. He prepared a compilation of ACS credits on fraud claims, Exhibit #C, based on Joint Exhibit #4, which summarizes the application of credits for fraud claims. This compilation (Exhibit #C) and Joint Exhibit #4 show that there is no basis for alleging that fraud claims were actually in excess of ninety days, there is no indication in PRTC's records when the billing was sent nor when it was received by ACS, nor was a detail of the application provided to ACS. Exhibit #F shows claims made in the amount of $7,108,883.41; Exhibit #C shows fraud claims credited in the amount of $5,774,678.38; for a balance of fraud claims made and not credited of $1,334,204.62. Exhibit #C also shows the amount of $29,560.95, included in the proof of claim (Joint Exhibit #5) as not processed or under investigation. Joint Exhibit #12 and Exhibit #D show the amount of $193,559.32 as fraud claims not processed. These claims were deemed not credited as the same do not include a date or specific reason for rejection. The assumption made by Mr. Negrette is that if no date is indicated, then the claims were not processed. The only claims that were included in the compilation were those in Joint Exhibit #12, and in which the total claim was denied

and the comments column indicated not applicable or not processed. The two criteria were considered. That is, Exhibit #D only contains credits that were denied and which appear in Joint Exhibit #12.

Based on Joint Exhibits #4 and #6, Mr, Negrette testified that of the total fraud claims rejected, the amount of $1,111,084.35 corresponds to claims rejected because they were submitted after 90 days from billing.

ACS established a fraud claims department to handle the increased number of fraud claims reported by its clients. ACS corroborated the claims by calling the suspect numbers and inquiring whether they knew the owner of the number. Mr. Negrette testified that ACS exercised utmost due diligence in verifying the fraud claims before submitting them to PRTC. According to Mr. Negrette, it was unreasonable to require from a wholesaler like ACS to comply with the same time period of 30 days to verify and corroborate fraud claims as was required from individual clients. ACS billing included thousands of clients as compared to an individual client. ACS would receive the billing tapes, on the average, within ten days. The time period that PRTC imposed on its wholesaler clients contrasts with its own processing experience in handling fraud claims. Exhibit #E, prepared using as basis Joint Exhibit #12, shows the time it took PRTC to process the fraud claims submitted by ACS. In fact, PRTC recognized this by increasing the time period from the 30 days in 1993, to 60 days in 1994, and to 90 days towards the end of 1994. That it took PRTC well in excess of 90 days is a good indication that 90 days for a wholesaler was not reasonable.

The testimony by Mr. Negrette, upon cross examination, showed that ACS granted its own clients the same period of thirty days that PRTC required from ACS to verify claims. This procedure may seem, on its face, to equitably bar ACS from alleging that thirty days was not reasonable. The difference, however, lies in that ACS clients were individual clients, and the time needed to responsibly corroborate possible fraud claims is necessarily less than it takes a wholesaler to verify thousands of accounts.

ACS requested from PRTC that it be allowed a period of 120 days to process the fraud claims due to its volume. This period was based on the fact that it was taking PRTC more than 120 days to process them. Joint Exhibit #59 is an internal PRTC memo requesting approval of ACS fraud claims because existing technology did not allow proper control for cloned calls, calls not completed, calls made by units activated by unauthorized users after the HEX number was stolen, and which were billed to the legitimate customer. The same can be concluded from Joint Exhibits #60, #62, #64 and #65.

There is no contest in the fact that PRTC has control over its own cellular network. The agreement between the parties (Joint Exhibit #1, Section V.F) implies the obligation of PRTC to maintain proper standards of maintenance and operation and to exercise reasonable supervision. Likewise, it frees PRTC from liability due to negligence of the RESELLER or its authorized users. The evidence before the court is that ACS exercised due diligence in the processing of fraud claims and that any misuse was by unauthorized users. On the other hand, PRTC was unable to properly maintain its network by not controlling the

unauthorized use of stolen HEX numbers, either because the technology was not available or not timely procured.

On June 30, 1996 the Office of the Comptroller of the Commonwealth of Puerto Rico issued an audit of the PRTC, Exhibit #F. Annex I to the audit report makes findings on losses due to fraud in the cellular service. Some of the findings in said report mirror the complaints made by ACS to the PRTC and evidenced at this hearing. Some of these are: that cellular fraud manifested itself in 1992, and that PRTC did not take timely action to procure computerized equipment and programs to combat cellular fraud. The report also states the obvious, "[i]t is the responsibility of management [PRTC] to take effective control measures to detect and reduce on a timely manner the incidence of cellular fraud." The control measures taken by the PRTC were clearly not effective.

ACS contends, and the court agrees, that the fraud claims were unfairly denied by imposing time limitations less than 120 days, which were unreasonable under the circumstances, and because PRTC did not exercise adequate control over its network to control and detect unauthorized or fraudulent use of its network.

The total for fraud claims not credited, as shown in Exhibit #C, is **$1,334,204.62.**

Payments not Credited

The manner in which PRTC credited payments on the invoices made it difficult to reconcile the payments made, particularly since neither the check number nor the amount were indicated. Joint Exhibit #4 shows that approximately $353,000.00 were not applied due to failure

to track all payments. In preparing for this hearing Mr. Negrette made a compilation of all payments made by ACS, including ACS checks, PRTC payment binder, and credits posted by PRTC as per Joint Exhibit #4. The compilation of payments made by ACS during the period in question, 1993 to 1998, are in Exhibit # G. The payments made are as follows:

Year		Amount($)
1993		8,777,325.34
1994		9,048,874.91
1995		6,618,958.63
1996		5,102,701.89
1997		2,270,210.00
1998		292,920.82
	Total	32,110,991.59

All the above payments were received by PRTC but ACS cannot ascertain if all were credited or applied as PRTC did not provide ACS with a detail of amounts applied by check number, amount and account to which applied. Mr. Negrette prepared a schedule of payments made by ACS based on Joint Exhibit #4, and divided by billing cycle. The schedule is Exhibit #H for ACS, and shows payments during the period from 1993 to 1998 as follows:

Cycle		Amount($)
3		18,874,598.20
7		12,882,718.57
	Total	31,757,316.77

PRTC counsel showed Exhibit ID. #B to Mr. Negrette. This exhibit for identification purported to show that payments were made by ACS and not credited. The cancelled

checks were available but the credit could not be traced. Mr. Negrette testified that the same was not used because he subsequently found copies evidencing payment in the check binder of PRTC, which showed that they had been credited. This shows his honest intent to prove amounts through credible and accurate evidence. Another example of candidness on the part of Mr. Negrette was when he was asked if the supporting documents to Exhibit #G included original checks by ACS. His straightforward answer was that the evidence was the non negotiable stub of the original check, that is, the duplicate copy that remains in ACS books and records. However, Mr. Negrette did verify personally the original checks to corroborate the compilations. So there is no real controversy as to the fact that the payments were made. The court notes that this frank statement contrasts with the wavering testimony by Ms. Celia López when posed similar questions.

The difference between the amounts paid according to Exhibit #G and those credited in Exhibit #H is **$353,674.82**.

Incorrect Rounding of Air-time

The testimony of Mr. Negrette is that PRTC incurred in a form of over billing by rounding up to six seconds the duration of calls. The agreement [Joint Exhibit #1, Paragraph XI] prescribes that PRTC will invoice air time usage according to the applicable tariffs which are in Joint Exhibit #2. Joint Exhibit #2 states that the "timing of calls" for chargeable time begins when the call is answered and ends when disconnected, rounding to the next second. Engaging in rounding chargeable time in increments of six seconds violates the tariff agreement.

Upon cross examination Mr. Negrette admitted that ACS billed its own clients based on the billing submitted by PRTC and charged a gross margin of twenty five percent. PRTC charges that to allow ACS to recover the amounts from PRTC after passing the cost to its clients would be inequitable. Again, in a straight forward and business like manner, Mr. Negrette indicated that this is a matter for ACS customers and that PRTC cannot benefit from whatever gross profit ACS charged its customers.

In order to quantify the over billing due to incorrect rounding, Mr. Negrette prepared a compilation using Joint Exhibits #15, #16, #17, and #18. The compilation is in Exhibit #I. He determined the over billing due to rounding based on the air usage charge. PRTC invoices include the total number of minutes charged, the total number of calls, and the amount invoiced to ACS. If you divide the amount billed by the number of minutes, you get the amount billed per minute. Joint Exhibit # 20 supports the allegations made by ACS in that PRTC admits in writing that rounding is incorrect. Mr. Negrette used as an example Joint Exhibit #19, an invoice for $148,136.57. The invoice shows that all calls were rounded in multiples of six seconds. This occurrence is highly unlikely. The unlikeliness of all calls being rounded in multiples of six seconds was shown using the Bell Curve Principle, a basic principle of statistics and probabilities. The calculation yields an estimate of three cents per call. This analysis, in the court's opinion, is a valid challenge to PRTC's rounding procedures in the billing process. An average of three cents, and not six cents should have been charged. It was PRTC's burden of establishing that the actual time was charged, rounded to the next second. PRTC did not meet

the burden. The over billing totals as per Exhibit #I are **$300,062.95.**

Billing Tapes Withheld

Exhibit #J, in conjunction with Joint Exhibit #31, show the amounts in the billing tapes that were not forwarded by PRTC after service was disconnected and which ACS would have used to bill its own clients. The request by ACS for these tapes was declined by PRTC. See Joint Exhibit #31. The total amount for the tapes that were not delivered after service was disconnected is **$55,537.88.**

Burden of Proof-Objection to Claim

An objection to the allowance of a proof of claim is a contested matter. Fed. R. Bankr. P. 3007, 9014. The contested matter is a core proceeding over which the bankruptcy court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B), 1334. The filing of a proof of claim is prima facie evidence of its validity. Fed. R. Bankr. P. 3001(f). Thus, the objecting party has the initial burden of controverting the claim. However, the ultimate burden is on the claimant to establish the validity and extent of the claim. Lawrence P. King, et al., 9 Collier on Bankruptcy, ¶ 3007.01[2], pp. 3007-2 to 3, 15th ed. rev'd 2002. *In re Hemingway Transport, Inc.,* 993 F.2d 915 (1st Cir. 1993). The claim must be established by a preponderance of the evidence.

Discussion

The events leading to the actual hearing on debtors' objection to the proof of claim filed by the PRTC have been marked by the bitter dispute between the parties relating to discovery issues. Since the onset of the contested matter it was clear that the evidence in support of the claim was voluminous and difficult to reproduce. At the hearing it became apparent, in spite of the efforts by able counsel, that PRTC's system of invoicing and accounting of payments made and credited was not accurate and reliable. The witnesses presented by PRTC were the officers responsible for the recording of payments by ACS. Yet, their inability to properly account for the amounts claimed as owed by ACS in light of the challenges posed by ACS debilitated the reliability that their own books and records may have carried. On the other hand, the thorough knowledge of the operation and the relevant issues to the objection to PRTC's claim displayed by Mr. Negrette, debtor's president, and the explanations made through the compilations he prepared based on the joint exhibits submitted by the parties and produced by PRTC during discovery, carried the weight of the arguments presented by ACS in the objection to claim.

Duty to Credit Fraud Claims

To allege that PRTC had no contractual obligation to make adjustments for fraud claims and at the same time to have actually credited in excess of five million dollars during the period from 1993 to 1998 is a contradiction by itself. There is no specific provision in the agreement prescribing the period within which to submit claims for erroneous or improper charges, including fraud claims. Likewise, there is no specific provision in the agreement

regarding cellular fraud. In 1986, when the parties entered into the agreement, cellular fraud was not a problem.

PRTC had control over its cellular network and had the duty to maintain and operate the same in servicing the agreement with resellers such as ACS. To think that adjustments in excess of five million dollars were made out of mere liberality or concession is not credible. That PRTC continuously reviewed and enlarged the period to submit fraud claims is also an indication of an obligation to provide a reasonable time to present claims. Therefore as a matter of law and common sense, PRTC had a duty to make the adjustments for the fraud claims and to allow ACS a reasonable time, such as 120 days, to submit their fraud claims. PRTC's duty and responsibility to control and maintain its network is directly related to the services it provides ACS as a reseller. Failing to maintain adequate controls to prevent fraudulent usage of its own network should not result in ACS bearing the cost of the breach. To credit claims presented within a reasonable time is not a set off of mutual debts, it is an obligation arising from the duty to maintain and operate the network.

Crediting of Payments

A preponderance of the evidence, as stated above, shows that ACS made payments in excess of the amounts that appear credited by PRTC during the period from 1993 to 1998. Any deficit should be credited in favor of ACS and deducted from the proof of claim.

Incorrect Rounding

The invoices and the explanation given by Mr. Negrette clearly established that rounding air time to six seconds was against the tariff agreement which required actual time rounded to the next second. Statistically it was unreasonable to round calls to any number in excess of three seconds. Moreover, the PRTC failed to rebut the challenge of improper rounding and establish that the amounts charged were for actual time rounded to the next second. Therefore, the amounts claimed as a result of improper rounding should be deducted from the proof of claim.

Obligation to Submit Tapes after Disconnection

Irrespective of whether PRTC had the legal right to disconnect service to ACS, it had no right under the agreement to retain the billing tapes for periods over which ACS provided the service to its own customers. By doing so, PRTC engaged in an automatic set off of amounts allegedly owed by ACS, without presenting then, or to this date, the legal basis for doing so. Any amounts for the retained tapes that ACS could have used to bill its customers should be deducted from the proof of claim as being illegally retained.

Conclusion

In view of the foregoing, the court hereby concludes that the following amounts should be deducted from the proof of claim filed by the PRTC:

1. Fraud claims in the amount of $ 1,334,204.62

2. Payments not credited in the amount of $ 353,674.82

3. Incorrect rounding of air time usage in the amount of $ 300,062.95

4. Billing tapes withheld after disconnection of service in the amount of $ 55,537.27

Since the amounts to be credited total $ 2,043,480.27, and exceed the amount of the proof of claim, that is, $ 1,655,391.96, the court finds and concludes that the proof of claim filed by the PRTC should be disallowed in its entirety.

The clerk shall enter judgement accordingly.

SO ORDERED.

San Juan, Puerto Rico, this 8th day of March, 2002.

/s/ Enrique S. Lamoutte
ENRIQUE S. LAMOUTTE
U.S. Bankruptcy Judge

United States Court of Appeals
For the First Circuit

No. 06-1332

IN RE: ADVANCED CELLULAR SYSTEMS, INC.;
ADVANCED PAGING SYSTEMS, CORP.

Debtors

PUERTO RICO TELEPHONE COMPANY, d/b/a
Verizon Wireless, f/k/a Celulares Telefonica, Inc.,
f/k/a Verizon Wireless Puerto Rico, Inc.

Creditor-Appellant

v.

ADVANCED CELLULAR SYSTEMS, INC.;
ADVANCED CELLULAR PAGING SYSTEMS, CORP.

Debtors-Appellees

Before

Boudin, *Chief Judge,*
Torruella[1], Lynch and Lipez, *Circuit Judges,*
Gibson[2], *Senior Circuit Judge,*
and Howard, *Circuit Judge.*

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[1] Judge Torruella is recused and did not participate in the consideration of this matter.

[2] Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

ORDER OF COURT
Entered: May 30, 2007

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:
Richard Cushing Donovan, Clerk

By MARGARET CARTER
Chief Deputy Clerk

PUERTO RICO TELEPHONE COMPANY
WHOLESALE SERVICE AGREEMENT

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WHOLESALE SERVICE AGREEMENT

PUERTO RICO TELEPHONE COMPANY, a corporation organized under the laws of the State of Delaware and authorized to do business in the commonwealth of Puerto Rico (hereinafter P.R.T.C.) and (hereinafter "RESELLER") agree as follows: the terms and conditions hereunder will apply to any RESELLER order per this Agreement for the provision of Cellular Radio Service (CRS) by P.R.T.C.

I. DEFINITIONS

Access Number – A telephone number provided to RESELLER by P.R.T.C. and associated with RESELLER's or its authorized user's mobile radio unit, enabling use of the cellular system.

Airtime Usage – The time measured in minutes during which RESELLER or its authorized user utilizes the cellular system.

Authorized User – A person, corporation or other entity that is authorized by RESELLER to use the CRS purchased by RESELLER from P.R.T.C.

Cellular Custom Calling Features:

a) Call Forwarding

Allows a customer to re-direct calls intended for their Cellular Telephone to another telephone number.

b) Call Waiting

Allows an individual customer currently engaged in a call to be alerted that another incoming call as been received.

c) Three-Way Calling

Allows a customer to add a third party to an existing call.

Cellular Geographic Service area (CGSA) – The geographic areas defined by the Company as its service objective in FCC filings.

Cellular Radio Service (CRS) or *Domestic Public Cellular Telephone Service* – A common carrier service licensed by the FCC, which uses cellular radio technology in the provision of radio telecommunication service between mobile subscribers, and between mobile subscribers and the *public switched* telephone network. (Abbreviated "DPCRTS" and also sometimes referred to as "Cellular Service").

Cellular System – A mobile telecommunications system which provides CRS.

Mobile Subscriber Unit – A radiotelecommunications transceiver, designed and FCC type accepted for DPCRTS subscriber use, which may be either vehicle mounted or hand held.

Mobile Service Area – The FCC authorized area served by a cellular system. It may include one or more cellular Geographic Serving Areas.

Off-Peak Usage Period –

(1) 7 PM to 7 AM Monday through Friday and all day on Saturday and Sunday.

(2) The off-peak period rates apply to the peak period for the holidays specified below:

New Year's Day (January 1)
Three Kings Day (January 6)

Good Friday
Independence Day (July 4)
Constitution Day (July 25)
Labor Day
Christmas (December 25)

Peak Usage Period –

(1) 7 AM to 7 PM Monday through Friday

II. UNDERTAKING OF P.R.T.C.

P.R.T.C. undertakes to provide the services outlined in this Agreement under the terms and conditions specified herein and in all applicable tariff filings. Any additional or varying terms, conditions or rates offered by P.R.T.C. or its authorized agents are null and void and are not part of the undertaking of P.R.T.C. unless otherwise specified on this Agreement or the approved tariff.

P.R.T.C.'s undertaking is dependent upon its ability to obtain, retain and maintain, without unreasonable expense, suitable facilities, licenses and rights for the construction and maintenance of the necessary circuits and equipment.

III. AVAILABILITY OF CRS

A. CRS is available to cellular mobile radio units equipped for this service while they are within the range of cell sites located in the Mobile Service Area.

B. Subject to the terms and conditions specified in this Agreement, CRS will be provided to any person, firm or corporation or other entities

wishing to become a Reseller and meet P.R.T.C.'s credit criteria.

C. CRS may be temporarily refused or limited due to system capacity limitations.

D. CRS is subject to transmission limitations caused by atmospheric and other conditions.

E. Service to any or all customers may be temporarily interrupted or curtailed due to cellular system modifications, upgrades, relocations, repairs and similar activities necessary for the proper or improved operation of CRS.

IV. TERM

A. Service is offered on a monthly basis subject to an initial minimum service period of six months beginning on the date service is provided to RESELLER.

B. This Agreement will become effective when signed by RESELLER and subsequently accepted in writing by P.R.T.C. and the Agreement will continue to be in effect until terminated as provided in Clause XXI herein. Any additional service order request under this Agreement will have the same effective and termination dates as the original contract.

V. LIABILITY

A. Because P.R.T.C. has no control over the communications via its CRS and because of the unavoidability of errors incident to the use of CRS, the CRS furnished by P.R.T.C. is subject to the terms, conditions and limitations herein specified.

P.R.T.C. GIVES NO WARRANTY, EITHER EXPRESSED OR IMPLIED CONCERNING THE FACILITIES OR THE SERVICES, INCLUDING WITHOUT LIMITATION, WARRANTIES OR MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OR USE. THIS DISCLAIMER APPLIES ONLY TO COMMERCIAL PURCHASES OF THE SERVICE SOLD BY RESELLER, AND DOES NOT APPLY TO END USERS.

B. No credit or adjustment will be issued for interruptions of CRS, unless the interruption continues for a period of 24 hours, as measured from the time the interruption is reported to P.R.T.C.

C. In the event of an interruption of CRS that exceeds the minimum requirements in 'B' above, a credit allowance will be made, at the RESELLER's request, for a prorata adjustment of all monthly access charges billed by P.R.T.C. for services rendered inoperative due to the interruption.

The credit allowance will be computed by dividing the duration of the service interruption (measured in 24-hour days) from the time the interruption is reported to P.R.T.C. by a standard 30-day months, and then multiplying the result by P.R.T.C.'s fixed monthly charges for each interrupted access number. A period of time less than 24 hours shall not be credited and an additional period of 12 hours or more shall be considered an additional day. In no case shall the credit exceed the monthly access charges. No other liability shall be attached to P.R.T.C. in consideration of such interruption to service.

D. A credit allowance will not be given for interruptions caused by the negligence or willful acts of RESELLER or of its authorized users or by interruptions caused by failure of equipment or service not provided by P.R.T.C.

E. P.R.T.C. is not liable for any act or omission of the facilities used in the provision of CRS not provided by P.R.T.C.

F. The services furnished by P.R.T.C. in addition to the limitations set forth preceding, also are subject to the following limitation: The liability of P.R.T.C. for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission, or failures or defects in facilities furnished by P.R.T.C., occurring in the course of furnishing CRS and not caused by the negligence of RESELLER or its authorized users, or of P.R.T.C. in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, shall in no event exceed an amount equivalent to the proportionate charge to RESELLER for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission, or failure or defect in facilities occurs.

RESELLER or its authorized users shall have no rights to consequential damages for reason of such mistakes, omissions, interruption, delay, or errors or defect in transmissions or failure, or defect in facilities.

G. P.R.T.C. shall in no event be liable for interruption or delays in transmission, or errors or defects in transmission, or failure to transmit when caused by acts of GOD, fire,

war, riots, act of Government or other causes beyond its control.

H. RESELLER or its authorized users indemnifies and saves P.R.T.C. harmless or libel, slander, or infringement of copyright from the material transmitted over its facilities; against claims for infringement of patents arising from, combining with, or used in connection with facilities of P.R.T.C., apparatus and systems of RESELLER or authorized user; and against all other claims arising out of any act or omission of RESELLER in connection with facilities provided by P.R.T.C.

I. P.R.T.C. is not liable for damages for any accident or injury resulting from the use of the mobile radio unit when such accident or injury is not due to the negligence of P.R.T.C.

J. P.R.T.C. is not liable for any defacement or damage to RESELLER'S or its authorized user's vehicle resulting from the existence of the mobile radio unit.

VI. SERVICE ACTIVATION/DEACTIVATION

Access numbers provided to RESELLER will not be activated until notification is received from RESELLER. Notification shall be deemed to have been received on the date given when hand delivered, sent by facsimile or similar means of communication acceptable to P.R.T.C.

P.R.T.C. will activate service for RESELLER within twenty-four (24) hours of P.R.T.C.'s acceptance of the service order request. Activation will only be performed by P.R.T.C. during regular working hours, Monday through Friday, except legal holidays.

VII. TARIFF, RATES AND CHARGES

Tariff, rates and charges may be changed at the sole discretion of P.R.T.C., subject to such approval as required by Law.

VIII. BASIC OBLIGATION OF RESELLER

The RESELLER will be responsible to pay P.R.T.C. the applicable tariff rates and charges for the services provided.

IX. TIMING OF CALLS

A. RESELLER is charged for airtime usage when calls are originated and when calls are received as provided for in the applicable P.R.T.C.'s tariff.

X. DEPOSITS & ADVANCE PAYMENT

A. P.R.T.C. may, in order to safeguard its interests, require an applicant or RESELLER to make a suitable deposit to be held as guarantee of payment, and/or request an advance payment and/or a Financial Guarantee Bond for the sum of $25,000.00 for the first block of numbers, and may also require the same type of bond for the amount of $10,000.00 per each additional block.

In the case that the Surety could cancel the aforementioned bond or bonds by giving written notice, P.R.T.C. should receive such notice under the same terms as the RESELLER.

B. The fact that a deposit has been made neither relieves RESELLER from complying with P.R.T.C.'s regulations on the prompt payment of bills on presentation nor constitutes a waiver or modification of the regulations of P.R.T.C. providing for the discontinuance of service for non-payment of any sums due P.R.T.C. for service rendered, subject to procedures required by Law.

XI. BILLING

A. P.R.T.C. will bill RESELLER for basic and access charges one month in advance for each access number.

B. Magnetic tapes will be provided monthly to RESELLER. The tapes will identify detail airtime usage, toll calls, message units and operator information charge, for each access number. P.R.T.C. shall charge $175.00 per month for these tapes. (magnetic tapes in 9 track 1600 BPI mode).

XII. RATES FOR FRACTIONAL PERIODS

The charges for a fractional part of a month will be a proportionate part of the monthly recurring charge based on the actual number of days the service is provided. For the purpose of administering this regulation, every month is considered to have 30 days.

XIII. USE

A. Use of Service by RESELLER.

(1) Service is furnished for use by RESELLER or authorized users.

(2) An access number may not appear in more than one mobile radio unit.

(3) Orders, including those which involve the activation, change, or the discontinuance of service, will be accepted by P.R.T.C. only from RESELLER.

(4) Services provided herein may be resold subject to applicable state and/or federal regulation.

B. Abuse and Fraudulent Use of CRS

Service to RESELLER or its authorized users shall be governed by the following:

(1) Service shall not be used to make foul or profane expressions, to impersonate another person with fraudulent or malicious intent, to call another person so frequently or at such times of day or in any other manner so as to annoy, abuse, threaten, or harass such other person, or for any unlawful purpose.

(2) Service shall not be used in such a manner as to interfere unreasonably with the use of the service by any authorized user.

XIV. USE OF MARKS

RESELLER shall not directly or indirectly hold itself out as or otherwise create the impression that they are sponsored, authorized, endorsed by,

affiliated with, or an agent of P.R.T.C., or any affiliate or successor thereof, including but not limited to using the name PUERTO RICO TELEPHONE COMPANY, any mark used by P.R.T.C. or any affiliate, or any colorable imitation thereof in or as part of any company name or trade name or in any other confusing or misleading manner without the written consent of P.R.T.C.

XV. PROVISION OF THE MOBILE RADIO UNIT

A. P.R.T.C. shall not be responsible for the installation, operation, quality of transmission or maintenance of any RESELLER's or authorized user's mobile radio unit.

B. RESELLER or its authorized user must provide any maintain all mobile radio unit equipment and ensure that it is technically and operationally compatible with the cellular system and in compliance with applicable Federal Communications Commission rules and regulations.

C. The operating characteristics of such equipment shall be such as not to interfere with the service offered by P.R.T.C.

XVI. TELEPHONE NUMBERS

RESELLER and/or its authorized user has no property right over the telephone number (access number) associated with the mobile radio unit. P.R.T.C. reserves the right to assign, designate or change such numbers when reasonably necessary in the conduct of its business.

XVII. OTHER CARRIER CHARGES

RESELLER is responsible to pay P.R.T.C. for all measured services and toll charges resulting from the origination of mobile calls. These charges are in addition to the charge for usage.

XVIII. PAYMENT OF CHARGES

A. RESELLER is responsible for payment of charges for all services furnished including, but not limited to , all calls originated by or completed to RESELLER's mobile radio unit, as well as any other charges billed to RESELLER's access numbers. Charges are based on prices in effect at the time service is furnished.

B. In the event a mobile unit is stolen, RESELLER is liable for all usage and toll charges originating from such unit until such time that P.R.T.C. is notified.

C. Payment must be made on the 30th day following the invoice date.

XIX. DISCONNECTION OF SERVICE FOR CAUSE

A. Upon nonpayment of any sum due P.R.T.C., or upon a violation of any of the conditions governing the furnishing of service as provided in this agreement, P.R.T.C. may without incurring in any liability, either temporarily discontinue the furnishing of service to RESELLER or terminate the contract subject to procedures as required by Law.

B. Where RESELLER's or its authorized user's equipment is used with facilities provided by

P.R.T.C. in violation of any of the provisions of this agreement, P.R.T.C. will take such action as necessary for the protection of its facilities or the service of its customers. RESELLER shall discontinue such use of the equipment or correct the violation immediately and shall confirm in writing to P.R.T.C. within 5 days that such use has ceased or that the violation has been corrected. Failure of RESELLER to discontinue such use or correct the violation and to give the required written confirmation to P.R.T.C. within the period stated above shall result in interruption of that part of the RESELLER's service causing trouble. Disconnected service will be restored when RESELLER complies with the provisions of this agreement.

C. Service may be refused or discontinued without notice in the event the service is used in such a manner that will adversely affect P.R.T.C.'s service to others.

XX. NON-DISCRIMINATION

RESELLER shall not unreasonably discriminate among its retail customers in allocating service capacity purchased from P.R.T.C.

XXI. TERMINATION/DEFAULT

A. This Agreement may be terminated by RESELLER upon thirty (30) days' written notice to P.R.T.C. or by P.R.T.C. if RESELLER is in default as outlined in paragraph B or is disconnected for cause as specified in Section XIX. If termination precedes expiration of the

contract period, RESELLER will be liable for *charges through the end of the contract period.*

B. RESELLER will be in default under this Agreement if (i) RESELLER fails to pay any charge when due or fails to perform or observe any term or condition of this Agreement, if such failure shall continue unremedied after thirty (30) days as of CUSTOMER's receipt of notice thereof from P.R.T.C.; or (ii) a proceeding in bankruptcy, reorganization, insolvency, receivership or assignment for the benefit of creditors is instituted by or against RESELLER.

C. In the event of default by RESELLER, P.R.T.C. may terminate this Agreement or any service orders or unfilled purchase orders accepted hereunder. Also, P.R.T.C. may, without incurring in any liability before *RESELLER or its authorized users*, either temporarily discontinue furnishing service to RESELLER or terminate the contract. RESELLER shall indemnify and hold harmless P.R.T.C. from any such liability to RESELLER's authorized users.

Upon such termination by P.R.T.C., termination charges will apply as set forth in *this Agreement.*

D. At the time this Agreement is terminated for any reason, RESELLER *and P.R.T.C. agree to facilitate the provision of CRS to authorized users. In such event, RESELLER will either arrange for another retailer or dealer to provide CRS* or shall provide P.R.T.C. with sufficient information on RESELLER's authorized users so that P.R.T.C. can continue to provide service to these parties.

E. RESELLER may terminate this Agreement, subject to payment of accrued charges but without liability for termination charges, if P.R.T.C. fails to perform or observe any term or condition of this Agreement and such failure shall continue unremedied for thirty (30) days after P.R.T.C.'s receipt of notice thereof from RESELLER.

XXII. ASSIGNMENT

This Agreement is not assignable or transferable by either party without the written consent of the other, except that P.R.T.C. may, without RESELLER's consent, assign this Agreement to an affiliate or subsidiary or assign its right to receive payment hereunder; and its assignee shall have the rights, powers and remedies of P.R.T.C. RESELLER will not assert against P.R.T.C. unless expressly permitted by law. P.R.T.C. shall impose a service ordering charge for the process of an order for each block of numbers as provided in the applicable P.R.T.C.'s local tariff, if it consents to RESELLER's assignment of this contract to another.

XXIII. GENERAL

A. Any modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties. Variances from this Agreement in any RESELLER order will be of no effect, except that the prices specified in *Attachment A* may be changed at the sole discretion of P.R.T.C. within the guidelines of the appropriate tariff.

B. If any term or provision of this Agreement shall be held invalid or unforcible, the

remainder of this Agreement shall not be affected thereby and each term shall be valid and enforced to the fullest extent permitted by Law.

C. THIS IS THE ENTIRE AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE PROVISION OF CRS AND ASSOCIATED SERVICES PROVIDED HEREUNDER AND SUPERSEDES ALL PRIOR AGREEMENTS, PROPOSALS OR UNDERSTANDINGS WHETHER WRITTEN OR VERBAL.

PUERTO RICO
TELEPHONE COMPANY

/s/ César Negrette Muñiz	/s/ Pedro A. Galarza
(Authorized Signature)	(Authorized Signature)
/s/ César Negrette Muñiz	/s/ Pedro A. Galarza
(Name)	(Name)
Presidente	Presidente
(Title)	(Title
Date 5 de septiembre de 1986	Date 22 septiembre de 1986

WITNESSED

/s/ [Illegible]
Vice President Legal
Affairs

WHOLESALE SERVICE AGREEMENT PRICING

1.	Service Ordering Charges	
	a. To process an order for block of numbers, each block	$ 50.00
	b. To activate each number	15.00
	c. To restore or change a number to add or modify call restriction features; per number affected	10.00
2.	Access and Usage Charges	
	a. Basic Monthly Charge	
	First group of 200 numbers	850.00
	Each additional group of 100 numbers	425.00
	b. Monthly access charge per activated number	23.75
	c. Usage Charges	
	Each minute; peak period	0.28
	Each minute; off-peak period	0.14
3.	Enhanced Services	
	Enhanced Services are offered as an optional package. An end user may select all or any combination of the following services, per number, per month	
	a. Call Forwarding	
	Allows an end user to re-direct calls intended for their Cellular Telephone to another telephone number	1.45
	b. Call Waiting	
	Allows an end user currently engaged in a call to be alerted that another incoming call has been received.	1.45

c. Three-Way Calling

Allows an end user to add a third party to an existing call. 1.45

UNITED STATES BANKRUPTCY COURT
DISTRICT OF PUERTO RICO

PUERTO RICO TELEPHONE AUTHORITY

(Filed by Puerto Rico Telephone Company
on FEB 24 1994)

(Authorized by P. R. Telephone Authority
on FEB 24 1994, Effective on MAR 27 1994)

* * *

DOMESTIC PUBLIC CELLULAR RADIO TELECOMMUNICATIONS SERVICE

IV. Service offering (Cont.)

B. Wholesale Cellular Service (Cont.)

4. Terms of Payment (Cont.)

c. In the event an authorized user's mobile unit is lost, stolen or otherwise absent from the authorized user's possesion or control, the reseller shall nevertheless be liable for all charges attributable to the access number assigned to such Mobil Customer Unit the loss, theft or disappeareance is reported to the Company.

5. Reseller obligations

a. The identity of the calling party shall be established in the course of communication as often as necessary and the calling party shall be solely responsible for establishing the identity of the person or persons with whom connection is made.

b. The use of the Cellular Service shall at all times be subject to the control of the operator at the control point of the Cellular Telecommunications.

c. The reseller shall be solely responsible for all risk and expenses incurred in connection with its actions in the sale and service of the Cellular Service or any other acts required of the reseller . . . pursuant to this tariff. The reseller shall act in all respect on its own account and shall be solely responsible for any credit verification, deposits, billing, consolidation, rebilling, reseller or authorized user billing complaints, toll calls, bad debts and fraudulent use, by any person of any number or numbers assigned to the reseller.

d. The reseller and/or authorized user indemnifies and holds the Company harmless against claims for libel, slander or infringement of copyright from the material transmitted over the Company's facilities; against claims from infringement of patents arising from combining with, or using in connection with facilities of the Company, apparatus, and systems of the reseller or its authorized users; and against all other claims arising out of any act or omission of the reseller in connection with facilities provided by the Company.

6. The reseller and the Company shall enter into an agreement having additional terms and conditions to those included in this tariff.

V. Rate Period and Timing of Calls

A. Rate Periods for Usage

Applicable rates of Cellular Service are applied twenty four (24) hours daily, all days of the week.

B. Timing of Calls

1. Chargeable time for calls originated or received by a Mobile Customer Unit begins when the call is answered and ends when it disconnects.

2. The accumulated monthly usage for calls is rounded to the next minute for billing purposes.

VI. Rates and charges

	Charges
A. Retail Service	
1. Service Deposit	See Section E-12
2. Service Ordering Charge	
a. To process an order for each number	$30.00*
b. To restore or change a number, to add or modify call restriction features or change the identification number of the Mobile Customers Unit; per number	$ 7.50

* At the Company's option, this tariff will not apply during special dates and/or during promotional periods from time to time.

3. Itemized Monthly Charges*

For each monthly itemized bill statement to the customer. .99

4. Access and Usage Rates**

The following monthly access and per minute usage rates shall apply at customer's option.

OPTIONS*

	Access Numbers	Rent	Minutes Admitted Airtime	Charges per Additional Minute Airtime
A	1-4	$ 35.00	–	$0.35
B	1-4	59.00	75	0.33
C	1-4	79.00	150	0.30
D	1-4	119.00	300	0.27
E	5-10	31.95*	**	0.25
F	11-24	30.95*	**	0.25
G	25- +	29.95*	**	0.25

* * *

* For customers with Tariff Options E, F and G, the charge of ninety nine ($0.99) cents will not apply (See this page, Section VI.A.4.)

** For Station to Station Operator Calls, under the single access number plan, to one of the public network, will apply the charge of $1.15, in addition to the air time charge; according to the subscribed per additional minute charges option.

* Apply for one (1) bill, under one address, for all numbers under that account.

** Eight (8) minutes per access number.